91-464

SUPREME COURT, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEAMSTERS LOCAL NO. 71,

Petitioner,

v.

HERMAN WALKER, BRADLEY COLESWORTHY, TERA B. SLAUGHTER and THOMAS DILLON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Union is responsible for the decision of a joint labor-management grievance committee solely because an officer of the Union served as a member of the bi-partite committee in a case which did not directly involve the Union and in which the Union did not participate.

2. Whether a Union is obligated to present for membership ratification an arbitral decision in which the arbitrator exceeded his jurisdiction by amending the terms of the contract.

3. Whether a court reviewing an arbitration award is required to consider whether the award draws its essence from the contract before considering whether another interpretation of the contract is correct.

PARTIES BELOW

The Plaintiffs and Appellees in the proceedings below were as follows:

> Herman Walker, Bradley Colesworthy, Tera B. Slaughter and Thomas Dillon as representatives of a class of employees represented by Teamsters Local Union No. 71 employed by Consolidated Freightways, Inc., Transcon, Inc., and Pie Nationwide.

The Defendants and Appellants in the proceedings below were as follows:

> Consolidated Freightways, Inc., Transcon, Inc., Pie Nationwide and Teamsters Local Union No. 71.

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TEAMSTERS LOCAL NO. 71,

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HERMAN WALKER, BRADLEY COLESWORTHY, TERA B. SLAUGHTER and THOMAS DILLON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Teamsters Local Union No. 71 respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in this case affirming the District Court's conclusions that Local 71 violated Section 101(a)(1) of the Landrum-Griffin Act and breached its duty of fair representation and that the Employers breached their collective bargaining agreement with the Union.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 930 F.2d 376 and is reproduced at App. 46a. The decision denying the Motion for Reconsideration and Suggestion for Rehearing In Banc is not reported and is reproduced at App. 70a. The Mandate is reproduced at App. 73a.

The decision of the United States District Court for the Western District of North Carolina is reported at 714 F.Supp. 178 and is reproduced at App. 1a. The District Court's Judgment is unreported and is reproduced at App. 44a.

JURISDICTION

The Court of Appeals issued its decision on April 11, 1991. The Court Denied the Petition for Rehearing and Suggestion for Rehearing in Banc on June 20, 1991. The Court of Appeals' Mandate became effective on June 27, 1991. This Petition is timely filed with this Court under 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. **§159(a):**

(a) **Exclusive representatives-Employees' adjustment of grievances directly with employer.** Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. **§411(a)(1):**

(a)(1) **Equal rights.** Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. §185(a):

(a) **Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, amy be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §173(d):

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

STATEMENT OF THE CASE

A. The Facts[1]

Prior to the expiration of the 1982 - 1985 National Master Freight Agreement and Carolina Supplement ("NMFA"), road drivers' mileage pay had been calculated by multiplying the mileage rate by established mileage figures between various cities. This is often referred to as "AAA" or "post office to post office" mileage, since the "zero mileage point" for many cities and towns is located at or near the main post office. [App. 10a]. On March 31, 1985, the NMFA expired. Negotiations for a new contract continued after the contract expired. In May, 1985, the parties reached tentative agreement on a new contract. [App. 7a].

Article 52, Section 3 of the 1985 - 1988 agreement provided that within six months the parties would convert from zero point mileage to terminal to terminal mileage. Mileage would be adjusted by establishing a common check point outside each terminal city and by calculating the distance from the common point to each terminal. This "spur" mileage would then be added to the AAA mileage from check point to check point. The new provision acknowledged that disputed "trunk" ("over-the-road") mileage would also be recalculated. Section 2 of the new contract established a procedure for resolving disputes over AAA or trunk mileage, culminating in a proceeding before

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[1]Material in regular type is derived from the District Court's Findings of Fact. **Material in bold type is derived from Stipulations by the parties which were not incorporated in the District Court's Findings.**

the Carolina Bi-State Grievance Committee. [App. 8a-9a]. The recalculation of the spur mileage was to become effective by December 1, 1985. [App. 9a].

After the ratification of the NMFA, a dispute arose whether the trunk miles as well as the spur miles had to be calibrated. The Employers argued that Article 52, Section 3 required the recalibration of only spur miles. [App. 11a]. **The Local Unions, however, insisted on recalibrating both spur and trunk mileage. As a result of this dispute, the calibrations were delayed through the summer of 1985. Finally, on September 4, 1985, Local Union 391 filed grievances against placing in dispute all trunk miles in order to break the deadlock and raise "disputed over-the-road mileage" under Article 52, Section 3.**

As a result of Local 391's grievances, the Carolina Negotiating Committee met on September 9, 1985 and appointed a Mileage Subcommittee to calibrate the terminal to terminal mileage including trunk miles and spur miles. The Carolina Negotiating Committee also established the "rules, regulations and guidelines" for recalibrating mileage. The guidelines stated, in pertinent part, as follows [App. 12a-13a, 52a-53a]:

> (4) Will submit completed mileage checks to the Bi-State Committee on November 20 and such mileages are to be implemented by the carriers on December 1. Mileage checks completed after November 20 will be submitted to the Bi-State on a monthly basis.

Local 71 notified all its stewards, including Walker, of the Guidelines at a September 25 meeting. Shortly

thereafter, Local 71 posted the Guidelines on bulletin boards at the various freight companies.

When none of the terminal-to-terminal mileage adjustments was implemented on December 1, Walker began asking Local 71 officials when the recalibration would be complete and whether the adjustments would be retroactive to December 1. On February 17, 1986, Walker filed a "class action grievance" stating that as of February 17, 1986, "the carriers have not implemented the new mileage figures as they had agreed to on September 9, 1985." The grievance requested all mileage recalibrations be "retroactive to December 1, 1985, just as the carriers agreed to on September 9, 1985." [App. 14a]. Local 71 processed the class action grievance and it was accepted as timely by Consolidated Freightways, his employer. [App. 17a].

Pursuant to their understanding of Article 52, the employers and the unions reported the results of the mileage recalibration to the Carolina Bi-State Grievance Committee. In the past, the Bi-State Committee had been presented with mileage reports in order to approve the mileage figures so that all companies would be paying the same amount. [App. 19a-20a].

The Bi-State Committee met on March 20, 1986 to consider the first mileage report, which was docketed as Case No. 144-R-86, the grievance previously filed by Local 391. [App. 19a].[2] The report stated that some 90%

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[2]**Local 71 was not a party to this presentation.** Local 71 Business Agent Ken Bowman was on the panel which decided the case. [App. 20a].

of the mileages had been measured [App. 19a]. Without considering or discussing the pending Walker grievances, the panel ruled that "the mileages are accepted as submitted and shall be effective May 4, 1986." [App. 15a].[3]

On Friday, March 21, 1986, at the Union Hall, Local 71 Business Agent Ken Bowman informed President Conrad Sides, Business Agent Cecil Carricker and several stewards that the Bi-State Committee had decided that terminal to terminal mileage would be effective May 4, 1986. Sides did not agree with the decision. "He went into orbit." He said "they've got to be out of their minds." The stewards said that they would inform their members. Sides instructed them to do so. During the next two weeks, the stewards advised many of the drivers of the Bi-State Committee decision.

At its April 12 regular monthly meeting, Sides explained to the membership that the Bi-State Committee had ruled that the calibrations would be effective May 4, 1986. On April 17, Sides had notices posted in the drivers' rooms of each Employer's terminals announcing the Bi-State

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[3]**The data furnished to the Local Unions and Companies pursuant to 144-R-86 had to be tailored to each operation. This consumed significant time. The Mileage Subcommittee report contained only the trunk mileage and the spur mileage, without combining them to determine the mileage between terminals. Following the approval of the mileage recalibration, representatives of each Company and each Local Union met to review the gross data and to calculate the new mileage for each run. This task took several weeks. The Bi-State Committee apparently chose the May 4 effective date to permit these additional calculations.**

Committee decision and the effective date of May 4. [App. 16a].

Local 71 submitted the various Walker grievances to the Bi-State Committee on May 9, 1986. Local 71 summarized the grievances as follows:

> **On September 9, 1985, the Carolina Negotiating Committee met to set forth rules, regulations, and guidelines that were to be followed in logging miles from terminal to terminal. It was agreed the mileage checks would be submitted to the Bi-State Grievance Committee on November 20, 1985 and implemented by all carriers on December 1, 1985. The Union is requesting all new mileage figures be rolled back to and paid to all drivers retroactive to December 1, 1985 just as the carriers agreed to on September 9, 1985.**

[App. 54a, 68a-69a].[4]

On August 11, 1986, Walker and Local 71 Business Agent Ken Bowman met at Local 71's office to

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[4]On May 12, 1986, after terminal-to-terminal mileage went into effect on May 4, Walker filed a similar grievance on behalf of himself and 41 other designated employees, again requesting retroactive implementation to December 1, 1985. [App. 17a-18a, 54a]. **On July 21, 1986, Walker filed a grievance protesting the mileage figures used by Consolidated and also protesting Consolidated's delay until June 29, 1986 in implementing the new mileage figures. Again, Local 71 processed the grievances.**

discuss the submission of the grievances to the Bi-State Committee. [App. 68a]. Bowman believed that the gate-to-gate mileage should be effective December 1, 1985. He processed the Walker grievances under Article 52, Section 3 rather than Article 52, Section 2 of the Contract in an attempt to change the effective date of the mileage from May 4, 1986 to December 1, 1985.

The Bi-State Committee heard Walker's grievances on September 16, 1986. [App. 15a]. The delay between February and September was caused by the following: Local 71 Business Agent Bowman was sick and underwent operations in both March and April. He met with Consolidated to discuss the Walker grievances in May and submitted them to the Bi-State Committee in early May. In June the Bi-State Committee did not get to the case. In July the Bi-State Committee held no meeting. Bowman postponed the case in August so that it would be the first case heard in September. [App.68a].

Business Agent Ken Bowman and Walker presented Local 71's position at the Bi-State Committee hearing in September, 1986. Sides was also present and participated. In response to a point of order from the Committee, Walker and Bowman limited the scope of the grievance to all Consolidated employees represented by Local 71. The Consolidated representative acknowledged that Consolidated began paying terminal-to-terminal mileage on July 17, but stated that the payments were retroactive to May 4. Walker conceded that Consolidated had complied with the May 4 effective date. Walker and Local 71 urged that the mileage be retroactive to December 1, 1985.

Sides argued to the Bi-State Committee that the September 9 agreement requiring payment effective December 1 "was the intent of all parties concerned when we left [the meeting] that day" and that "that was the intent of both sides at that meeting. Both Union and Company, was to fulfill that" agreement.[5] Walker does not challenge the Union's presentation of his grievances.[6]

On September 16, 1986, the Bi-State Committee issued the following decision in Case No. 259-R-86 [App. 55a]:

> Based on the evidence that the Company is in compliance with Article 52, Section 2 and the decision of this committee in case 144-R-86 and further that the minutes of

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[5]Sides, like Bowman, always believed that the gate-to-gate mileage should be effective December 1, 1985, in accordance with the Contract.

[6]Walker had the opportunity to introduce whatever documents he desired and to speak freely while presenting Local 71's case. [App. 69a]. Walker and Bowman had the opportunity at the Bi-State Committee hearing to put in all the evidence they desired. They presented all the evidence that they wanted to present. The Company did not misrepresent any facts to the Committee. Bowman did not do anything improper at the hearing on Case 259-R-86.

Walker does not accuse Sides, Bowman, or any official of Local 71 of any bad faith or wrongdoing in connection with the terminal-to-terminal implementation or his grievance or his representation at the Bi-State Committee hearing. Up to the time of the Bi-State Decision on September 16, Walker never complained or objected to Bowman about his representation or presentation to the Bi-State Committee.

> **the Sept. 9, 1985 meeting of the Carolina Neg. Comm. are merely guidelines, the claim is denied.**

Subsequent to the decision in Walker's grievance, the Carolina Bi-State Committee heard and decided at least four other cases dealing with the same or similar issues. In Case 363-R-86, *Local Union 61 v. Carolina Freight Carriers Corporation*, which challenged the December 1 date as well as the May 4 date, the Committee decided that:

> **The committee finds based on the evidence presented including the testimony of the grievant, that when reading Article 52, Section 2 and 3 as governing this case the effective date of May 4, 1986 for implementation of gate to gate mileage is proper under the contract, therefore the claim is denied.**

On September 19, 1986, Walker and 15 others filed an internal union charge alleging, *inter alia*, that Local 71 and the Joint Council 9 officials who sat on the Carolina Negotiating Committee violated the Teamsters' Constitution by failing to conduct a referendum among the road drivers concerning the delay until June 29, 1986 in implementing terminal-to-terminal mileage. The charge sought a referendum. [App. 15a-16a]. **This was the first time the absence of a referendum was raised as an issue. The International Union did not hear the charges because of the pendency of the litigation in this case.**

This action was filed on October 14, 1986. [App.16a].

B. The Litigation

Plaintiffs filed their class action Complaint on October 14, 1986 alleging that the three employers and two employer associations (Trucking Management, Inc. and Carolina Trucking Association, Inc.) breached the collective bargaining agreement covering them by refusing to pay the proper mileage pay between October 1, 1985 and May 4, 1986. The Complaint also alleged that Teamsters Local Union Nos. 71, 28, 61, 391 and 509 and Teamsters Joint Council No. 9 violated the duty of fair representation owed the Plaintiffs by failing to ensure that the employers paid the proper mileage pay.

By Order dated September 4, 1987, the District Court granted the Plaintiffs' Motion to dismiss defendants Trucking Management, Inc. and Carolina Trucking Association, Inc.

By Order dated November 24, 1987, the District Court dismissed by agreement the suit as to Defendant Teamsters Local 509; granted Motions to Dismiss by Teamsters Locals 28, 61 and 391; and granted a Motion for Summary Judgment by Teamsters Joint Council 9.

By Order dated February 19, 1988, the District Court conditionally certified the following Plaintiff class:

> All over-the-road drivers covered by the provisions of the Carolina Supplement to the National Master Freight Agreement for the

> period April 1, 1985, to March 31, 1988, who were employed by Consolidated Freightways, Inc; Transcon, Inc.; or P.I.E. Nationwide, during the period between October 1, 1985, and May 4, 1986.

Local 71 had argued that the plaintiff class must be limited to those employees represented by Local 71. The parties then stipulated that "The named plaintiffs and the class members are members of Local 71". Despite this stipulation, the District Court reiterated the larger Plaintiff Class conditionally certified on February 19, 1988. [App. 2a].

Following extensive discovery and the denial of the Defendants' Motions for Summary Judgment, the District Court conducted a non-jury trial in Charlotte, North Carolina on May 24-26, 1988. On May 8, 1989, the District Court issued its Findings of Fact and Conclusions of Law and Judgment. [App. 1a].

The District Court ruled that the Bi-State Committee's action on March 20, 1986 constituted an amendment to the collective bargaining agreement. Consequently, the committee exceeded its authority when it modified the contract. The court also ruled that Local 71 assented to this renegotiation of the contract as embodied in the committee decision and thereby breached its duty of your representation because it did not submit this renegotiation to the members for approval. The failure to submit the committee's ruling to a vote was also violative of Title I of the LMRDA.

In addition, the district court held that Local 71 violated its duty of fair representation when it "failed to seek timely implementation" of the mileage subcommittee"; when it "failed to raise the issue of pay" when it became clear that the calibration would not be completed on schedule; and when it delayed processing Walker's grievances. The District Court also rejected the union's contention that the action was barred by the Statute of limitation. Concomitantly, the court held that the employers had breached the collective bargaining agreement, and entered judgment ordering the employers "to pay back pay based upon gate-to-gate mileage to affected drivers retroactive to December 1, 1985."

On April 11, 1991, the Fourth Circuit substantially affirmed the District Court's ruling, although it reversed the lower court's decision as to the scope of the affected class as to the employers. The majority did not address the statute of limitations issue raised by the Appellants.

Judge Sprouse dissented, arguing that the Bi-State Committee's March 20, 1986 decision drew its essence from the contract, which at least arguably prohibits retroactive pay for mileage recalibrations. App. 63a-64a. Judge Sprouse further concluded that the delays in calibrating the mileage were neither unreasonable nor arbitrary, and were based on the unions' desire to recalibrate all miles, not just spur miles as contemplated by the contract. He found that because Local 71 consistently believed that the contract required retroactivity it reasonably saw no urgency in completing the calibration process. App. 66a. He would have concluded that the Union did not breach its duty of fair representation in either the calibration process or, given the parties'

stipulations, the processing of Walker's grievances. App. 67a-69a.

On June 20, 1991, the original panel denied appellants' petition for rehearing (Sprouse, J., dissenting). On that same day, appellants' suggestion for rehearing *in banc* was also denied (Ervin, Phillips, Murnaghan, and Sprouse, JJ., dissenting).

REASONS FOR GRANTING THE WRIT

I. A Union is not responsible for the decision of a joint labor-management grievance committee solely because an officer of the Union served as a member of the bi-partite committee in a case which did not directly involve the Union and in which the Union did not participate.

In *Teamsters Local 89 v. Riss and Co., Inc*, 372 U.S. 517 (1963), the Court held that decisions of bi-partite arbitration committees are to be accorded the same status as awards issued by neutral arbitrators. The Fourth Circuit's decision conflicts with the teachings of this Court and is inconsistent with numerous decisions in other circuits which hold that members of a bi-partite arbitration panel are clothed with arbitral immunity and have no duty of fair representation. The Fourth Circuit's decision will cause the

many unions[7] which now use bi-partite arbitration committees instead of neutral arbitrators, to reconsider their grievance-arbitration systems and lose the freedom recognized in *Riss* and in Section 203(d) of the Taft-Hartley Act, 29 U.S.C. §173(d).

As the District Court and Fourth Circuit recognized, the Bi-State Committee is the contractually established forum for resolving grievances under the contract and for confirming mileage recalibrations. [App. 20a-21a]. The lower courts then ignored two fundamental principles which flow from that finding: the principle of arbitral immunity and the principle that union officials on an arbitration panel have no duty of fair representation

Absolute immunity, "justified and defined by the functions it protects and serves, not by the person to whom it attaches," *Forrester v. White*, 484 U.S. 219, 227 (1988), has long shielded judges from damages liability for actions taken in the exercise of their judicial functions. *See Bradley v. Fisher*, 80 U.S. 335, 347 (1872). *See also Stump v. Sparkman*, 435 U.S. 349, 355-357 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979). This comparatively sweeping form of immunity has also been extended to executive branch officials who perform either quasi-judicial functions, or prosecutorial functions

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[7] *See, e.g., IBEW Local 969 v. Babcox & Wilcox*, 826 F.2d 962, 963 (10th Cir. 1987); *Lithographers Local 1 v Stearns & Beale, Inc.*, 812 F.2d 763, 766 (2d Cir. 1987); *Hammons v. Adams*, 783 F.2d 597, 599 (5th Cir. 1986) (Boilermakers).

"intimately associated with the judicial phase of the criminal process".[8]

As with judicial immunity, which "[protects] the finality of judgments [by] discouraging inappropriate collateral attacks . . . [and] also [protects] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants," *Forrester*, *supra*, 484 U.S. at 225 (*citing Bradley*, *supra*, 80 U.S. at 348), the scope of quasi-judicial immunity is defined not by the identity of the actor but by the nature of the function performed, namely freeing the adjudicative process and those involved therein from harassment or intimidation. *See Butz*, *supra*, 438 U.S. at 512.

Based primarily on the "functional comparability" of the arbitrator's role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts

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[8]*See Butz v. Economou*, 438 U.S. 478, 513-514 (1978) (administrative law judge and various agency officials); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). *Accord: Rudow v. City of New York*, 822 F.2d 324, 327-330 (2d Cir. 1987); *Barr v. Abrams*, 810 F.2d 358, 360-62 (2d Cir. 1987); *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926) (holding special assistant to the Attorney General of the United States absolutely immune from a civil action for malicious prosecution on principles of public policy), *aff'd*, 275 U.S. 503 (1927) (per curiam).

performed in their arbitral capacity.[9] As the Sixth Circuit stated in *Corey*:

> The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits. Immunity furthers this need. As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.

Supra, 691 F.2d at 1211. Further supporting the principle of arbitral immunity is the real fear that "individuals ... cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit." *Tamari*, *supra*, 552 F.2d at 781; *Austern*, *supra*, 898 F.2d at 885. Indeed, in light of the national policy which encourages

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[9]*See Austern v. The Chicago Board Options Exchange, Inc.*, 898 F.2d 882, 885-886 (2d Cir. 1990), *cert. denied*, 112 L.E.2d 107 (1990); *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987); *Ozark Air Lines, Inc. v. National Mediation Board*, 797 F.2d 557, 564 (8th Cir. 1986); *Austin Municipal Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 686-691 (5th Cir. 1985); *Auto Workers v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1185-1186 (6th Cir. 1983); *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1208-1211 (6th Cir. 1982); *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977); *Cahn v. International Ladies' Garment Workers Union*, 311 F.2d 113, 114-115 (3d Cir. 1962) (per curiam).

arbitration, it is said that the common-law rule protecting arbitrators from liability "ought not only be affirmed, but, if need be, expanded." Elkouri & Elkouri, **How Arbitration Works** at 143 (4th Ed. 1988) (citations omitted).

Accordingly, until the Fourth Circuit's decision in this case, the Courts of Appeals had uniformly held that arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process. While immunity applies unless the arbitrator acts "in the clear absence of jurisdiction", courts have applied *Stump* broadly and have found that judicial acts undertaken pursuant to a conspiracy or bribe or motivated by malice are protected by judicial immunity.[10]

Thus, the lower courts' holding that Local 71 breached its duty of fair representation because a Local 71 official served on the Bi-State Committee which approved the new mileage calculations conflicts with the principle of arbitral immunity. The lower courts did not suggest, much less find, that the Bi-State Committee acted "in the clear absence of jurisdiction" within the meaning of *Stump*.

Although it might be argued that union officials serving on a bi-partite arbitration are functionally unlike neutral arbitrators, the Courts of Appeals had uniformly held, prior to this case, that panel members have no duty of

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[10] *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985), *rehearing denied*, 773 F.2d 1236 (1985), *cert. denied*, 474 U.S. 1037 (1985); *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708, 723-724 (E.D. Pa. 1982), *quoting Stump v. Sparkman*, 435 U.S. 349, 357 (1978).

fair representation when they resolve cases to which their local union is not a party. Under the bi-partite system the labor and management representatives are not partisan and do not act as advocates. Thus, a union panel member's vote against a grievance does not constitute a breach of duty or even raise a triable issue of fact.[11] *Early v. Eastern Transfer*, 699 F.2d 552, 559 (1st Cir. 1983), *cert. denied*, 464 U.S. 824 (1983); *Teamsters, Local 30 v. Helms Express, Inc.*, 591 F.2d 211, 217 (3d Cir. 1979), *cert. denied*, 444 U.S. 837 (1979); *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708, 723-724 (E.D. Pa. 1982), *quoting Stump v. Sparkman*, 435 U.S. 349, 357 (1978).[12]

Because a union official serving as a panel member is not the representative of either party, the District Court and the Fourth Circuit's conclusion that he was required "to argue that the pay should be effective on December 1, as the contract provided" [App. 33a, 59a-60a] squarely conflicts with the dictates of this Court and the law in all other circuits. In *NLRB v. Amax Coal Company*, 453 U.S. 322, 334-336 (1981), this Court recognized that union and company officials serve a variety of functions and that an official serving as a fiduciary "must overcome any loyalty to

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[11]Here, of course, there is no record evidence concerning Bowman's vote at the Bi-State Committee.

[12]The Seventh Circuit's decision in *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909 (7th Cir. 1989) is, therefore, distinguishable. In *Thomas*, the offending union official served on a bi-partite panel considering a case in which his local union represented the grievant.

the interest of the party that appointed him."[13] Thus, in *Thomas v, United Parcel Service, Inc.*, 890 F.2d 909, 920 (7th Cir. 1989), the court held that a bi-partite grievance committee

> is to serve a meaningful purpose as an adjudicator of employment-related disputes, thereby requiring Committee members to exercise of fair and independent judgment on each petition presented to the Committee. Unlike the union representative assisting the grievant in preparing his petition and arguments, the union official sitting on [a bi-partite committee] does not have the interests of a single member at heart. The union official serving on a [bi-partite committee] discharges his responsibility to union members by not serving as an advocate for the grievant. ... "[m]embers of these [grievance] committees essentially function as arbitrators on an adjudicatory body, and consequently, they owe no 'duty of partiality' to either the employer or employee."

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[13]Following the Court's decision in *Amax*, the lower courts have acknowledged that the role and responsibilities of a union official differ significantly from those of a fiduciary under the Employee Retirement Income Security Act, 29 U.S.C. §1001, *et seq.* While acting as a plan fiduciary, the trustee may not act as a union advocate. *Pipefitters' Welfare Fund v. Mosbeck Industrial Equipment Inc.*, 856 F.2d 837, 842 (7th Cir. 1988); *Professional Administrators Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639 (6th Cir. 1987).

Only where the committee members "breach [their] arbitral duty of impartiality" [*Id.* at 921] does the union bear any liability, and then only for failing to obtain an impartial forum. There is no evidence of lack of impartiality in this case. *Contrast, Early v. Eastern Transfer*, 699 F.2d 552, 560 (1st Cir. 1983); *Chicago Cartage Co. v. Teamsters Local 710*, 659 F.2d 825, 835 (7th Cir. 1981); *Beregsasy v. Preston Trucking Co.*, 133 LRRM 2168, 2171-2173 (N.D. Ind. 1989) *with Kirkland v. Arkansas Best Freight Systems*, 629 F.2d 538, 542-543 (8th Cir. 1980).[14]

This issue is of paramount national significance because the Fourth Circuit's decision will impede union committee members from properly performing their arbitral duties. By imposing an advocacy obligation upon union panel members, the ruling below will compel management panel members to take an equal advocacy role, thereby effectively undermining the system expressly encouraged by Congress in Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. §173(d), and protected by this

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[14]In *Kirkland*, the court found that the International Union and the Conferences which established a bi-partite committee breached their duty of fair representation by failing to name an impartial panel as required by the contract: One member of the panel had a conflict of interest. Another did not pay attention to the proceedings. Contrary to the contract, the panel did not contain an equal number of union representatives from the affected Conferences. Thus the court concluded that although the panel's resolution of the dispute was reasonable, the composition of the panel did not meet the procedural requirements of the contract.

Court.[15] Consequently, the Court should accept this matter for review.

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[15]In view of the expansion of the National labor Relations Board's policy of deferral to the arbitration process, this Court's resolution of the split among the lower courts is of national significance. *See Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991) (*en banc*) (upholding NLRB deferral to contractual grievance procedure including bi-partite arbitration panel).

II. A Union is not obligated to present for membership ratification an arbitral decision in which the arbitrator exceeded his jurisdiction by amending the terms of the contract.

According to the Bureau of National Affairs, 75% of recent collective bargaining agreements contain clauses prohibiting an arbitrator from adding to, deleting, or amending the contract in the guise of interpreting the contract. **Collective Bargaining Negotiations and Contracts** at 51:7, 51:281-282 (BNA 1989). Parties to a contract may properly challenge an arbitral award on the ground that the arbitrator exceeded his jurisdiction by rewriting the contract. Not surprisingly, there are numerous cases addressing precisely this issue.

Until the decision in this case, however, not a single court held that the union was obligated to submit the rewritten contract for membership approval. The uniform remedy where an arbitrator exceeds his jurisdiction is to vacate the award and return the case for proper consideration by the same or a different arbitrator.[16]

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[16]*See, e.g., U.S. Postal Service v. American Postal Workers Union*, 922 F.2d 256, 257 (5th Cir. 1991); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1353 (6th Cir. 1989), *cert. denied*, 107 L.E.2d 20 (1990); *Pennsylvania Power Co. v. IBEW Local 272*, 886 F.2d 46, 49 (3d Cir. 1989); *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979); *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677, 681-682 (2d Cir. 1966).

The District Court and Fourth Circuit's conclusions that Local 71 violated the duty of fair representation and the Landrum-Griffin Act by failing to conduct a referendum on a mid-contract amendment is erroneous as a matter of law and is wholly inconsistent with their finding that no such amendment was ever properly negotiated. The District Court found that "The Bi-State Committee is not empowered to modify or amend the provisions of the collective bargaining agreement" [App. 20a, 58a] and concluded that "the Bi-State Committee exceeded its authority when it ruled on March 20, 1986, that implementation would be delayed until May 4, 1986". [App. 29a, 58a]. More importantly, the District Court concluded, "An arbitral body such as the Bi-State Committee has authority to interpret a contract, but the committee cannot rewrite the terms of the contract by altering express language". [App. 30a, 68-69a].

Local 71 did not conduct a ratification vote because it accurately believed that the contract had not been "amended." Local 71 did challenge the validity of the Bi-State Committee decision when it presented Walker's grievances to the Bi-State Committee. The lower courts did not challenge the Union's presentation of Walker's grievances and, in fact, the parties stipulated that the Union properly presented the grievances. [App. 68a-69a].

By accepting the Bi-State Committee's March 20 decision[17] and the adverse arbitration award on Walker's

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[17]Local 71 lacked standing to sue to set aside the Bi-State Committee decision establishing May 4 as the effective date for the recalibrations. Simply stated, Local 71 was not a party to the grievance between Local 391 and Roadway which produced the erroneous award. *Bacashihua v. U.S. Postal Service*, 859 F.2d 402, 405-406 (6th Cir. 1988); *Anderson*

grievances, Local 71 did not "negotiate" an amendment to the contract. Where a union faithfully arbitrates a grievance, it has no obligation to sue to set aside an adverse award. *Shores v. Peabody Coal Co.*, 831 F.2d 1382, 1384 (7th Cir. 1987); *Chernak v. Southwest Airlines Co.*, 778 F.2d 578, 581 (10th Cir. 1985); *Sear v. Cadillac Automobile Co.*, 654 F.2d 4, 7 (1st Cir. 1981). Here, of course, Plaintiffs stipulated that the Union properly processed Walker's grievances.

Yet under the Fourth Circuit's novel approach, a union which loses an arbitration alleging a change in the terms and conditions of employment must either sue to set aside the award or conduct a referendum on the "amendment." If the "amendment" is not ratified, the union would be required to sue anyway. Given the number of arbitration lost by unions, there would be suits and referenda every month.

Furthermore, the District Court and Fourth Circuit's holding that the duty of fair representation obligated Local 71 to conduct a referendum on the March 20 decision conflicts with this Court's holding in *NLRB v. Financial Institution Employees*, 475 U.S. 192, 205 (1986), and the numerous lower court decisions based upon it.

Title I of the Landrum-Griffin Act gives no rights to non-members. It was adopted to guarantee the free speech rights of union members. *See, e.g., Reed v. United*

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v. Norfolk & W.R. Co., 773 F.2d 880, 882 (7th Cir. 1985); *Vosch v. Werner Continental, Inc.*, 734 F.2d 149, 154 (3d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985).

Transportation Union, 488 U.S. 319, 325 (1989). Title I is captioned "Bill of Rights of Members of Labor Organizations. (Emphasis supplied.) Each subsection of Section 101, which creates substantive rights, expressly provides rights only for union members. Thus, Section 101(a)(1) provides that "Every member of a labor organization shall have equal rights and privileges within such organization ...." 29 U.S.C. §411(a)(1). Section 101(a)(2) provides that "Every member of any labor organization shall have the right to meet and assemble freely with other members ...." 29 U.S.C. §411(a)(2). Section 101(a)(5) provides that "No member of any labor organization may be fined ...." 29 U.S.C. §411(a)(5). Non-members have absolutely no rights under Title I of the Landrum-Griffin Act. *Moynahan v. Pari-Mutuel Employees Guild*, 317 F.2d 209 (9th Cir. 1963), *cert. denied*, 375 U.S. 911 (1963); *Johnson v. IBEW*, 181 F. Supp. 734 (E.D. Mich, 1960); *Adkins v. General Motors Corp.*, 556 F.Supp. 452 (S.D. Ohio, 1983).

Conversely, the duty of fair representation obligates a union to represent union members and non-members alike so long as they are employed in the represented bargaining unit. It does not, however, obligate a union to permit non-members to participate in internal union deliberations such as contract ratification. Under the National Labor Relations Act, "union members [are allowed] to control the shape and direction of their organization, and '[n]on-union employees have no voice in the affairs of the union.'" *NLRB v. Financial Institution Employees*, 475 U.S. 192, 205 (1986), quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967). Thus, the NLRB lacks authority to require that non-union members be allowed to vote on the affiliation of their exclusive bargaining agent with another union.

Financial Institution Employees, supra. The Supreme Court adopted the Board's position, first expressed in *Amoco Production Co.*, 239 NLRB 1195 (1979):

> That the option to participate in an affiliation election is not accorded to nonmembers differs little from their exclusion from other internal matters, including strike votes and contract ratification votes, and the selection of officers, stewards, and negotiators. But we have not found exclusion of nonmembers in those instances unlawful or incapacitating. [Footnote omitted.]

Because the duty of fair representation is based upon a union's status as exclusive bargaining representative under Section 9 of the National Labor Relations Act,[18] 29 U.S.C. §159, that duty gives non-members no greater participatory rights than does Section 9.[19]

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[18]*Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202-204 (1944); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

[19]Thus, the Union argued to the lower courts that the class is overbroad. Class members who are not members of Local 71 cannot claim that Local 71 deprived them of their rights under the Act. *Brennan v. Teamsters, Local 357*, 709 F.2d 611, 616 (9th Cir. 1983); *Gavin v. Ironworkers*, 553 F.2d 28, 30 (7th Cir. 1977). In "right-to-work" states, including North Carolina, union membership cannot be compelled by a union security clause. Consequently, non-members of the Union cannot be members of the class represented by Plaintiffs.

At the court of appeals, Plaintiffs conceded that the District Court improperly defined the class to include non-members of Local 71 because Local 71 owed a duty of fair representation only to members in

Neither the Landrum-Griffin Act nor the National Labor Relations Act gives union members the right to vote upon collective bargaining agreements prior to their execution by the union or their implementation by an employer. Section 101(a)(1) provides that every member shall have "equal rights ... to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organizations' constitution and bylaws." 29 U.S.C. §411(a)(1). Section 101 does not require submission of proposed collective bargaining agreements or any segment thereof to the union membership; nor does it grant members the right to vote on negotiating, executing and approving contracts. *Confederated Independent Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3rd Cir. 1972); *Alexander v. Operating Engineers*, 624 F.2d 1235, 1240 (5th Cir. 1980); *Local 6885, American Postal Workers Union v. American Postal Workers Union*, 665 F.2d 1096, 1101 (D.C. Cir. 1981). Section 101 provides only that if the union's constitution requires a referendum the union cannot discriminate by refusing to allow certain classes of members from voting. *See Calhoon v. Harvey*, 379 U.S. 134, 138-139 (1964).

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its bargaining unit and only members can sue under the Landrum-Griffin Act. Accordingly, Plaintiffs conceded that non-members of Local 71 cannot recover from Local 71. [Br. at 15].

Nevertheless, the Fourth Circuit defined the class to include all employees represented by Local 71 [A. ---], disregarding the fact that non-members of the Union had no right to vote in any referendum.

Because it extends to all employees in a bargaining unit, regardless of union membership, the duty of fair representation cannot encompass any internal union obligation to ratify contracts or contract amendments. By so extending the limited right to ratify contracts, the lower courts combined the provisions and precedents concerning Title I of the LMRDA and of the duty of fair representation. Although labor organizations must comply with both, they spring from totally independent statutory bases. The introduction of a remedy for a Title I violation into a fair representation action hopelessly blurs the distinctions between these theories. This judicial expansion of the LMRDA, coupled with the creation of a new remedy for the violation of the duty of fair representation, warrants review by this Court.

III. The lower courts did not consider the rationale of the Bi-State Committee's interpretation of the contract before accepting the Plaintiffs' interpretation.

From its seminal opinion in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-599 (1960), to its recent holding in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1987), the Supreme Court has consistently held that an arbitration "award is legitimate ... so long as it draws its essence from the collective bargaining agreement" and that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is

different from his." Simply stated, "a court should not reject an award on the ground that the arbitrator misread the contract." Thus, the test is not whether the Bi-State Committee's contractual interpretation is correct, but whether it draws its essence from the contract. *Misco*, *supra*.

As Judge Sprouse accurately observed, the Fourth Circuit "'ha[d] no business overruling [an arbitrator] because their interpretation of the contract [or facts] is different from his.'" [App. 65a, *quoting Steelworkers, supra*, 363 U.S. at 599]. Indeed, although the Fourth Circuit majority [App. 57a] and the District Court [App. 29a] both profess fealty to *Misco*, the decisions reveal an overt prejudice against the Bi-State Committee's interpretation without any effort to assess its logic before considering the Plaintiffs' contrary interpretation.

Although acknowledging that Local 391's grievance was necessary to resolve a "dilemma" concerning recalibration of trunk miles and that the grievance created a "'dispute' needed to implicate sections 2 and 3 of the contract" [App. 51a-52a], the Fourth Circuit majority ignored the express language of Section 2, which prohibits retroactive pay for mileage determinations. Having accepted the legitimacy of the recalibration of trunk mileage, the need to submit such recalibration to the Bi-State Committee, and the reasonable delay caused by this massive task, the Fourth Circuit majority was necessarily caught in the same trap as the Bi-State Committee: the retroactivity arguably required by Section 3 directly conflicts with the express ban on retroactivity in Section 2. As Judge Sprouse concluded, no resolution of the grievance could be fully consistent with the contract. [App. 64a-65a].

By concluding that the Bi-State Committee's decision to make the mileage calibration effective May 4, 1986 did not draw its essence from the contract [App. 58a], the Fourth Circuit majority required retroactivity in direct conflict with the dictate of Section 2. Conversely, had the Bi-State Committee required retroactivity, a reviewing court could also conclude that the award conflicted with Section 3 and did not draw its essence from the contract.

Given this unavoidable dilemma, the Bi-State Committee's decision is at least as reasonable as the Fourth Circuit's. In *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. ---, 113 L.Ed.2d 51, 65 (1991), decided after the submission of this case, this Court stressed "the importance of evaluating the rationality of a ... decision in the light of both the facts and the legal climate ... at the time the decision was made." Consistent with *Masters, Mates & Pilots v. Brown*, 498 U.S. ---, 112 L.Ed.2d 991, 1102-1003 (1991), also decided after the submission of this case, a court reviewing an arbitration award's fidelity to the contract should first consider the reasonableness of the arbitration award before considering the reasonableness of alternative interpretations.

Even a casual review of the Fourth Circuit's analysis of the Article 52 [App. 57a-58a] reveals that the court's focus was the District Court's interpretation, not the Bi-State Committee's. The District Court focused on "[t]he plain language" of the contract [App. 28a] and did not consider the rationality of the Bi-State Committee's decision.

In sum, neither court reviewed the Bi-State Committee decision as required by *ALPA* and *Masters, Mates and Pilots*. This Court should grant this Petition to

determine whether such review is required by *Steelworkers* and its progeny.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: September 12, 1991

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-86-462-M

HERMAN WALKER, BRADLEY COLESWORTHY, TERA B. SLAUGHTER and THOMAS DILLON,

Plaintiffs,

VS.

TEAMSTERS LOCAL 71, CONSOLIDATED FREIGHTWAYS, INC., TRANSCON INC., PIE NATIONWIDE,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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I. PROCEDURAL BACKGROUND

1. Plaintiffs brought this action alleging: (1) violations of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401 et. seq.; (2) violations of Section 301 of the Labor-Management Relations Act; (3) breach of contract; and (4) breach of the union's duty of fair representation. Plaintiffs seek damages for the violation of their right to vote on modifications to their collective bargaining agreement and their right to be fairly represented in contract negotiations. The heart of the controversy is allegations and evidence that the union, Teamsters Local No. 71, agreed to changes in plaintiffs' collective bargaining agreement without giving affected union members their right to vote on those modifications. Plaintiffs contend that the defendant employers joined in these modifications and breached the agreement, thus depriving the plaintiff class of wages.

2. A motion for class certification was filed by plaintiffs and was fully briefed and argued by counsel for the parties. On February 19, 1988, the court entered an order certifying a class of plaintiffs to include the following individuals:

> "all over the road drivers covered by the provisions of the Carolina Supplement to the National Master Freight Agreement for the period April 1, 1985 to March 31, 1988, who were employed by Consolidated Freightways, Inc.; Transcon, Inc.; or PIE Nationwide, during the period between October 1, 1985 and May 4, 1986."

3. The case was tried on May 24, 25 and 26, 1988. The court encouraged the parties to explore settlement, agreeing to hold the case open until Monday, June 6 for that purpose. Settlement discussions failed. Post-trial briefs were submitted, and thereafter the court filed a memorandum of decision indicating that it intended to rule in plaintiffs' favor and directing their counsel to submit proposed findings of fact and conclusions of law.

4. In deciding the issues, the court has carefully considered all of the evidence bearing on each such issue, and notes that there have been conflicts in the testimony on certain points. The court made decisions involving credibility and weight to resolve those conflicts. In assessing credibility, the court took into account the usual factors, including the witnesses' demeanor, any interest or bias and the witnesses' knowledge, education and experience. Based upon review of all of the evidence presented, the court

makes the findings of fact and conclusions of law set forth below.

II. FINDINGS OF FACT.

A. Parties.

5. Plaintiffs are over-the-road truck drivers who are members of Teamsters Union Local No. 71 and employed by companies which are signatories to the National Master Freight Agreement (NMFA), a nationwide agreement that covers approximately 200,000 trucking industry employees. Plaintiffs are also covered by the terms of the Carolina Freight Council Over-the-Road Supplemental Agreement (Carolina Supplement), one of the supplemental agreements negotiated simultaneously with the NMFA, which covers all class members. Herman Walker testimony, Exhibit 30.

6. Plaintiff Herman Walker is a truck driver employed by Consolidated Freightways, Inc. He is a resident of Gaston County, North Carolina and a member of teamsters Local 71. At the time this action was filed, he was an elected shop steward for Consolidated Freightways Road Drivers domiciled in Charlotte, North Carolina. Walker testimony.

7. Plaintiff Bradley Colesworthy is a truck driver employed by Consolidated Freightways, Inc. He is a resident of Gaston County, North Carolina and a member of Teamsters Local 71. Colesworthy testimony.

8. Plaintiff Thomas Dillon is a truck driver employed by Transcon, Inc. He is a resident of Gaston

County, North Carolina and a member of Teamsters Local 71. Dillon testimony.

9. Plaintiff Tera B. Slaughter is a truck driver employed at times relevant to this action by PIE Nationwide, Inc. He is a resident of Mecklenburg County, North Carolina and a member of Teamsters Local 71. Slaughter testimony.

10. Defendants Consolidated Freightways, Inc., Transcon Inc., and PIE Nationwide, Inc. (the employer defendants) are motor common carriers with terminals in Mecklenburg County, North Carolina. They are employers within the meaning of 29 USC §§ 152(2) and 185, and they are parties to the NMFA and the Carolina Supplement. Stipulated facts, paragraphs 5-7.

11. Defendant Teamsters Local #71 is an unincorporated labor organization with its principal office in Mecklenburg County, North Carolina. Along with the employer defendants, Local 71 is a party to the NMFA Carolina Supplement. Local 71 is a labor organization within the meaning of 29 USC §§ 152(5), 185 and 402(i). Local 71 is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT").

B. The Teamsters International Constitution.

12. Article XII of the Teamsters Constitution sets forth the union's requirement for contract ratification votes. These provisions require ratification prior to the signing of a new agreement as well as whenever mid-term modifications are made. Section 1(b) states:

> Contracts may be accepted by majority vote of those members involved in negotiations and voting, or a majority of such members may direct further negotiations before a final vote on the employer's offer is taken, as directed by the local Union Executive Board.
>
> ....
>
> All of the above provisions shall apply when a contract permits a re-opener or is voluntarily reopened, during its term.

Exhibit 29, Stipulated facts, paragraph 13.

13. Article XVI, Section 4(a) of the International Brotherhood of Teamsters Constitution in effect between June 5, 1981, and May 24, 1986, provides in pertinent part:

> If a majority of the votes cast by Local Union members voting approve such contract, it shall become binding and effective upon all Local Unions involved and their members.
>
> ....
>
> When a contract negotiated under the provisions of this article permits a re-opener and re-negotiation or is voluntarily re-opened during its stated term, the above shall apply to ratification of the new terms, if any, and Section 4(b) shall apply to strike votes.

Stipulated facts, para. 14.

14. The defendants know this requirement well. In several reported decisions, the Teamsters have been found

to have illegally modified the Collective Bargaining Agreement without first conducting a ratification vote of the affected members. *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984); *Conroy v. Teamsters Local 705*, 124 LRRM 2372, 127 LRRM 2556 (N.D. Ill. 1985); *Sako v. Teamsters Local 705*, 125 LRRM 2372, 127 LRRM 2556 (N.D.Ill. 1987).

15. In the past, Teamsters Local 71 has invoked these constitutional provisions to require ratification votes on matters as obscure as a change in the lunch hour for loading dock workers, and seniority dispatch. Brad Colesworthy testimony.

16. The defendant union acknowledges that mid-term contract modifications require a ratification vote, according to Conrad Sides, Local 71 President. Sides deposition at 134, 135.

C. The NMFA and the Carolina Supplement.

17. On March 31, 1985, the NMFA and the Carolina Supplement expired. Negotiation of a new contract continued after the old contract expired, and in May 1985, a tentative agreement was reached.

18. In May 1985, Conrad Sides, president of Local 71, announced the terms of the tentative agreement to the affected union members of Local 71 at a union hall meeting. Stipulated Facts 18. Dillon, Slaughter testimony.

19. At that meeting, Sides stated, "We've got some good news and some bad news. First, we finally got what you wanted -- gate-to-gate mileage." Slaughter

testimony. By "gate-to-gate mileage" Sides was referring to a new provision of the agreement which required the payment of drivers for the actual number of miles they drove from terminal-to-terminal.

20. After the contract meeting the agreement was submitted to the affected members for a ratification vote, and on May 17 1985, was ratified by the membership.

21. The new NMFA and Carolina Supplement ratified in may 1985 therefore included a new provision important to road drivers. This provision, contained in Sections 2 and 3 of Article 52, is at the center of the controversy now before the court; it provides:

> Article 52
>
> . . . .
>
> Section 2. Mileage Determination.
>
> Mileage shall be computed on official AAA mileage. Where a dispute arises, it shall be filed with the Bi-State Grievance Committee. The Employer and the Union shall then jointly log the mileage from terminal to terminal, and the results reported to the Bi-State Grievance Committee. Once this mileage is established, it shall immediately be applied to all runs operated over that particular route by all Employers operating between those two points. No Employer shall change its present mileage pay until the above procedure has been followed, unless such change is agreed to by the Local Union

involved. The speedometer of any measuring automobile must be calibrated prior to any measurement. Any change in mileage resulting from the above procedure shall not result in any retroactive pay to a driver or refund from a driver.

Section 3. Mileage adjustment.

Within six (6) months of the effective date of this Agreement, the parties will convert the mileage from zero point to terminal by jointly checking the miles to each terminal. It is understood the parties will establish a common checkpoint outside the terminal city and determine the difference in distance between the zero point and the terminal. Once the difference is established, the mileages will be adjusted. It is further understood that any disputed over-the-road mileage between points will be determined.

Stipulated Facts, para. 23, Exhibit 30.

22. The Carolina Supplement was ratified on May 17, 1985. By stipulation of the parties, the mileage provisions at issue in this case were "non-monetary provisions" which became effective on May 27, 1985. Allowing for the six-month conversion period contained in Article 52 of the Carolina Supplement, drivers should have been paid for their travel based upon the terminal-to-terminal rates beginning December 1, 1985.

23. Thus, within six months of the effective date of the newly ratified Carolina Supplement, the employers were required to pay the drivers for the actual mileage that they drove. This is called "terminal-to-terminal" mileage. The conversion to terminal-to-terminal mileage required recalibration of the mileages over all routes driven by class members.

24. Under the previous NMFA and Supplements, road drivers' mileage pay had been calculated by multiplying the mileage rate by established mileage figures between various cities. This is often referred to as "AAA" or "post office to post office" mileage, since the "zero mileage point" for many cities and towns is located at or near the post office. Plaintiffs contend that in almost all cases, the terminal-to-terminal mileage provisions benefit the class, because they increase by a substantial amount the number of miles for each trip the drivers work. Exhibit 74.

25. The members of Local 71 voted for the conversion to terminal-to-terminal mileage. They believed that the companies fared better than the drivers under the post office to post office method. The inclusion of terminal-to-terminal mileage in the agreement was therefore a popular and significant proposal. Walker testimony, Sides deposition at 35, 55.

26. Plaintiff Colesworthy testified that as an extra board driver, he ran most of the various trips that Consolidated Freightways had established, and that he wanted terminal-to-terminal pay because the drivers benefitted by it. He had compared the actual miles on his hubometer with the mileages that he had been paid for, and

found that he almost always drove more miles than he was paid for.

27. Plaintiff Walker testified that he had been suggesting the terminal-to-terminal mileage method to the union leaders for many years.

28. In negotiating this provision, the union intended that terminal-to-terminal mileage would be effective, and drivers would be paid on the basis of it, by December 1, 1985. Sides deposition.

29. The employer defendants assert that this contract language was ambiguous in that it did not require them to measure certain mileages prior to the calculation of terminal-to-terminal mileage. In particular, the employers assert that the language creates a distinction between 'trunk' miles, the miles between common checkpoints outside of cities driven to, and 'spur' miles, the miles between those checkpoints and each of the various terminals. The employers assert that the parties did not intend to measure trunk miles. Stip. Fact No. 27, Exh. 100.

30. The contract language does not support the employers' justifications for delay. The language of the first sentence of Section 3 unequivocally states that the mileages will be implemented within six months of the agreement's effective date. The language of the last sentence of Section 3 states that disputed trunk mileages will also be measured, thus answering the employers' contention.

31. The history of negotiations also shows that the six-month provision was intended to be final and binding. In negotiating this provision, the members of the Carolina

Negotiating committee recognized that measurement of terminal-to-terminal mileage would be a significant and large task. Charles Williams, who later became the key union player responsible for implementing terminal-to-terminal mileage, told the negotiating committee that they would need several months to measure all the mileages and put them into effect. Charles Williams testimony.

32. Even under the old AAA mileage system, measurements had been made when mileages for different runs were disputed. In addition, whenever new runs were established, those runs were always calibrated. Charles Williams had been in charge of recalibration of disputed runs for trips under the Carolina Supplement prior to 1985. Thus, both the union and employer defendants had participated in calibration of mileages and knew the difficulty of the task that they were facing. Charles Williams testimony.

D. Sequence of Events.

33. Even though terminal-to-terminal mileage was to be implemented within six months of the effective date of the contract, the defendants did not even meet to discuss mileage implementation until almost four months after contract ratification. On September 9, 1985, the Carolina Negotiating Committee appointed a mileage committee to calibrate the terminal-to-terminal mileage as required under Article 52. The Carolina Negotiating Committee also decided that terminal-to-terminal mileage would be implemented by December 1, 1985, stating:

> [The mileage subcommittee] will submit completed mileage checks to the Bi-State Committee on November 20 and such

mileages are to be implemented by the carriers on December 1. Mileage checks completed after November 20 will be submitted to the Bi-State on a monthly basis.

Exhibit 13, paragraph 4; Stipulated facts, paragraph 50 (emphasis added); Herman Walker and Charles Williams testimony; Exhibit 32.

34. The only step taken toward measurement of the mileages prior to October 21, 1985, was the September 9 meeting of the Carolina Negotiating Committee. Sides deposition at 89. At that committee meeting, the company and union representatives established guidelines for the recalibration of the various runs for trucking companies in the Carolinas. In addition to the provision set forth above, the guidelines required that the union and employers rent cars to measure the mileages, and place equal numbers of union and employer representatives in each car. The guidelines provided no mechanism for speeding up the measurement process. The guidelines did not establish a mechanism for measuring the mileages nor establish how they would be measured. Those decisions were delegated to the mileage subcommittee.

35. None of the terminal-to-terminal mileages were recalibrated during the first five months of the new 1985 contract. Mileage measurements did not even begin until October 21, 1985. Exhibit 63, p. 2, Williams testimony.

36. The contract language in Article 52, Section 3 of the Carolina Supplement clearly provided that any disputed trunk mileages should be measured. Exh. 30.

37. Union representative Charles Williams realized by the time of the September 9, 1985, meeting that the mileages would not become effective until several months after the six-month deadline had elapsed. Charles Williams testimony.

38. No complete runs were measured by December 1, 1985. The committee had chosen to measure all trunk mileages first, and to wait to do spur mileage calibrations upon completion of the trunk runs. Because of that method, no mileages were completed until March, 1986. Williams testimony.

39. Time passed. None of the terminal-to-terminal mileage adjustments was implemented on the December 1, 1985, date required by the Carolina Supplement and established by the Carolina Negotiating Committee. Plaintiff Walker began asking union officials when the terminal-to-terminal mileage implementation would be completed and whether adjustments would be made retroactive to December 1. When he failed to receive satisfactory answers, he filed his first grievance on February 17, 1986, as a "class-action grievance" on behalf of all road drivers covered by the 1985-1988 Carolina Supplement. Through this grievance, he attempted to assure that terminal-to-terminal mileage would be implemented promptly and made retroactive to December 1, 1985. Exhibit 64; Herman Walker testimony.

40. Walker filed an additional grievance on February 25, 1986 addressing the same issue. Exhibit 65; Herman Walker testimony.

41. While Walker's grievances were pending, the Carolina Bi-State Grievance Committee ("Bi-State Committee") met on March 20, 1986, to consider implementation of terminal-to-terminal mileage and ruled that "the mileages are accepted as submitted and shall be effective May 4, 1986."

42. Even though Walker's grievances were pending at the time, they were not considered or discussed by the Bi-State Committee on March 20. In fact, the Bi-State Committee did not consider Walker's grievances until many months later, on September 16, 1986, at which time Walker's grievances were denied. Exhibits 63, 64 and 65; testimony of Herman Walker, Charles Williams and Robert Bell.

43. After plaintiff Walker learned that implementation of terminal-to-terminal mileage had been delayed again, he filed another grievance in May, 1986, requesting retroactive implementation of the mileage adjustment to December 1, 1985. This grievance was not heard until September 16, 1986, at which time the claim was denied. Exhibit 64, Herman Walker testimony.

44. Afer Walker's grievances addressing the terminal-to-terminal mileage implementation date were denied on September 16, 1986, he and other union members filed internal union charges against Local 71 for failing to pursue actively implementation of terminal-to-terminal mileage in a timely manner and failing to conduct a

referendum among road drivers concerning delayed implementation. Exhibits 4, 5, and 6, Herman Walker testimony.

45. This action was filed on October 14, 1986.

E. Statute of Limitations.

46. The defendants contend that plaintiffs failed to file their action within the applicable six-month statute of limitations period, which they contend began to run on March 20, 1986, the date of the Bi-State Committee decision to implement terminal-to-terminal mileage beginning May 4, 1986. For purposes of considering this defense, the court makes the findings of fact set forth below.

1. When the Statute of Limitations Began to Run.

47. Following the March 20, 1986, decision to implement terminal-to-terminal mileage on May 4, 1986, local union president Conrad Sides posted a notice on April 17, 1986, informing union membership of the May 4, 1986, mileage implementation date. Exhibit 2.

48. At trial, the union called several witnesses who testified that they had learned of the March 20 Bi-State Committee decision some time between March 21, and April 17, 1988. Norris, Hagler, Bieber, Bowman testimony. Although the union defendants contend that the decision to delay implementation of terminal-to- terminal mileage was common knowledge among drivers by late March, 1986, the named plaintiffs consistently testified that they did not learn of the decision until after Conrad Sides posted his notice on April 17, 1986. Compare defendants' testimony of Hugh

Baxter, Horace Scarborough and exhibits 86-90 with testimony of Herman Walker, Brad Colesworthy, Tera Slaughter and Tom Dillon, and with Exhibits 91-93.

2. Tolling of the Limitations Period.

49. Plaintiffs contend that even if the limitations period began to run on March 20, 1986, or at some earlier date, any reasonable effort by the plaintiffs to exhaust remedies, however futile, tolls the statute of limitations. In considering whether the applicable limitations period was tolled, the court makes the findings of fact set forth below.

50. Plaintiffs assumed that the mileage provisions in Article 52 of the agreement would become effective in December. Although it was not implemented on that date, they thought that mileage pay under the terminal-to-terminal mileage system would be made retroactive to December 1, 1985. Walker, Colesworthy, Slaughter and Dillon testimony. They were not alone in this assumption. Conrad Sides, President of Local 71, also believed the pay would be made retroactive. Sides deposition, pp. 99-103.

51. When payment was not received in the weeks after December 1, Walker filed his first "class-action" grievance on February 17, 1986, on behalf of all drivers. Under the circumstances, this was a reasonable step by Walker, who believed that the employers had breached the agreement. The union processed this grievance, and it was accepted as timely by the employer. Exhibit 64, Walker testimony.

52. In April, Walker learned that the Bi-State Committee had decided to delay implementation of the

terminal-to-terminal pay, and make payment retroactive, but only to May 4, 1986. Again, Walker filed a grievance, assuming that the Bi-State Committee had acted outside of its jurisdiction, and that their decision could be corrected, as he stated at the September 16, 1986, hearing on all of his grievances. Exhibit 64, Sides deposition, pp. 39-40.

F. Arbitrability of Article 52, Section 3.

53. During the 1985 contract negotiations, Section 2 remained virtually unchanged, while Section 3 was "completely rewritten." See employer defendants' summary judgment brief, p. 5, testimony of Charles Williams. Examination of the language of Section 2 reveals that it was largely superseded by Section 3.

54. Section 2 had previously stated that "Mileage shall be computed in official AAA mileage" which is based on a distance between city centers, but this system was rejected when the parties agreed to convert to the terminal-to-terminal system. More importantly, Section 2 was intended to serve solely as a device for resolving disputes between the parties over the length of individual runs. Thus, in 1986, the Bi-State Committee heard a grievance filed by plaintiff Walker over the calculation of mileage on one of Consolidated's runs. Walker deposition at 134-35; Exhibit 20. Section 2 as a whole simply provides a mechanism for remeasuring runs which the driver or union feels are inaccurate. Seen in this light, the Section 2 provisions on retroactivity are reasonable; that the employers would not be penalized for previous errors by going back and checking the runs for each drive, when only a few would stand to gain. To apply the retroactive pay provision of Article 2 to Article 3 however, makes no sense, for it

gives the employers, who stand to lose money through Section 3, free rein to delay measurement of the mileage throughout the contract term.

55. In negotiating the new terminal-to-terminal provision, company and union representatives, according to Sides, spent "many, many negotiating sessions" working out the language in Section 3, and decided that they could complete the mileage checks necessary to implement the new system, and have them implemented, within six months. Sides deposition at 57-59, 99-100. According to Sides, his understanding of the agreement has always been that the payment for the new mileage would commence on December 1, and even after the employers failed to have the runs measured by that date, he expected the payment to be made retroactive to December 1, because that is what he had bargained for. Sides deposition at 99-103.

G. The Substantive Claims.

56. The Bi-State Committee has jurisdiction to resolve "all matters pertaining to the interpretation of any provision of this agreement." Stip. Facts, para. 30, Exhibit 30, Article 44, 1985-88 Carolina Supplement. The Committee consists of equal numbers of employer and union representatives.

57. On March 20, 1986, the employers and unions under the Carolina Supplement presented a mileage report to the Bi-State Committee. The report stated that some 90% of the mileages had been measured. Sides deposition at 104, Exhibit 63.

58. In the past, the Bi-State Committee had been presented with mileage reports in order to approve the mileage figures so that all companies would be paying the same amount. Sides deposition at 64.

59. Ken Bowman, business agent for Local 71, participated in the March 20 Committee decision. The Bi-State Committee is not empowered to modify or amend the provisions of the collective bargaining agreement. The mileage report submitted did not contain any request for interpretation of the agreement, only a submission of the mileage figures. Sides deposition. Nevertheless the Committee ruled that "the mileages are accepted as submitted and shall be effective May 4, 1986." Exhibit 63.

60. The transcript of the hearing reveals that the union did not even argue that the pay for terminal-to-terminal mileage should be made retroactive to December 1, 1985. Exhibit 63.

61. Carriers who did not have the mileages completed by May 4, 1986, were required to pay retroactively to that date. Sides deposition, Exhibit 63, Charles Williams testimony.

62. During the trial, the defendants argued that the contract required only that "spur" miles be recalibrated within six months and attempted to create a distinction between spur and "trunk" miles. This contention has no support in the language of the contract and does not excuse defendants from their obligation to convert the mileage pay system by December 1, 1985.

63. The contract provision at issue states:

> Article 52
>
> . . . .
>
> Section 3. Mileage adjustment
>
> Within six (6) months of the effective date of this agreement, the parties will convert the mileage from zero point to terminal by jointly checking the miles to each terminal. It is understood the parties will establish a common checkpoint outside the terminal city and determine the difference in distance between the zero point and the terminal. Once the difference is established" the mileages will be adjusted. It is <u>further understood that any disputed over-the-road mileage between the points will also be determined</u>.

Exhibit 30. (emphasis added)

64. The first sentence says that conversion to terminal-to-terminal was to take place within 6 months. The following sentences establish the procedure. The last sentence makes clear that trunk miles, where disputed, were to be recalibrated as well, and that the parties anticipated this when the contract was written. Thus, the recalibration and pay change was to occur within six months.

65. Evidence offered at trial showed that the drivers had anticipated recalibration within six months. The union defendants' witnesses anticipated recalibration within six months. Indeed, according to Teamsters Local 71

president Conrad Sides, the six-month implementation provision was added after many negotiations with the companies because they knew that it could not be implemented immediately. The six-month period was drafted to give the union and company representatives time to calibrate the miles. Sides deposition pp. 57-58. Charlie Williams, a union witness, testified that he had been involved in earlier recalibrations. Based on his prior experience, he informed the Carolina Negotiating Committee that recalibration would take an enormous amount of time and work. Williams testimony.

66. Until the Carolina Negotiating committee met on September 9, 1985, the terms "trunk" and "spur" miles had never been used. Sides deposition, p. 176. However, the Committee elected to measure both trunk and spur miles. Moreover, it elected to measure trunk miles first. Exhibit 13; Robert Bell testimony. Defendants contend that spur miles could not be measured until trunk mile calibrations had been completed. Somehow, defendants contend that this justifies their delay in making the conversion. The court finds no merit to this argument. The relevant provisions of Article 52 of the Carolina Supplement make no distinction between spur and trunk miles in requiring conversion to terminal-to-terminal mileage within six months.

III. CONCLUSIONS OF LAW

A. Statute of Limitations.
(Paragraph 1 of Memorandum of Decision.)

1. When the Statute of Limitations Began to Run.

1. Pursuant to *Reed v. United Transportation Union*, __ U.S. __ (1989) 57 U.S.L.W. 4088 (January 11, 1989), the statutory claims arising under section 101 (a) (1) of the Labor Management Reporting and Disclosure Act are governed by North Carolina's three-year statute of limitations for personal injury actions.

2. All parties acknowledge that the applicable statute of limitations to be applied to the statutory claims under 29 U.S.C. 185 and 186 is six months. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). The dispute between the parties concerns when the statute begins to run as to these claims. Defendants contend that plaintiffs should have filed this action within six months of the Bi-State Committee decision on March 20, 1986, or at some earlier date.

3. Teamsters Local 71 has tried to show that plaintiffs should have known about the March 20 Bi-State Committee decision more than six months before this suit was filed. The union defendant has offered this evidence in an attempt to claim that the six-month statute of limitations ran before the suit was filed. For the re sons stated below, however, this defense has no merit.

4. The credible testimony of plaintiffs shows that they did not know about the adverse action of the Bi-State Committee until Conrad Sides posted a notice of the action on April 17, 1986. Suit was filed within six months of that date.

5. Without attempting to explain why President Sides waited almost a month after the March 20 Bi-State Committee decision before posting this notice, the defendants have attempted to claim that the decision was "common knowledge" among the drivers before that date. Defendants' assertion that it was "common knowledge" and a topic of conversation among the drivers on their CB radios before the April 17 notice does not trigger the limitations period any sooner. Workplace scuttlebutt does not commence the running of the statute of limitations. For whatever reason, local union president Conrad Sides chose to wait until April 17, 1986, to announce the March 20 Bi-State Committee decision. Defendants cannot now claim that plaintiffs should be charged with knowledge of the decision at some earlier date.

2. Tolling.

6. In any event, even if defendants are correct in their assertion that the limitations period began to run on March 20, 1986, or at some earlier date, the statute was tolled by plaintiffs' attempt to exhaust internal remedies.

7. In *Clayton v. International United Automobile Workers*, 451 U.S. 679 (1981), the Supreme Court held that exhaustion of internal union remedies is normally a prerequisite to a duty of fair representation suit and that the statute of limitations is tolled during that period. Thus, the

six-month statute of limitations did not begin to run during the time that plaintiffs were attempting to resolve the issues in this case through their grievance procedures and internal union remedies. Here, Herman Walker's various grievances, including his February 17, 1986, "class action grievance" were pending and were not decided until September 16, 1986. Thus, the statute of limitations period was tolled until September 16, 1986.

8. In *Frandsen v. Brotherhood of Railway, Airline & Steamship Clerks*, 782 F.2d 674 (7th Cir. 1986), the court held that the six-month statute of limitations was tolled during the time when internal union remedies were being pursued. In a detailed analysis of the issue, the court noted:

> *Clayton* and *DelCostello*, read together, envisage the following scheme: an employee seeking to vindicate his right to fair representation has six months from the date of his injury to file suit in federal court. At the same time, however, he must pursue internal union procedures that possibly may provide him with a remedy. Thus, during the pendency of those union procedures, the six-month statute of limitations is tolled, to commence running only when the union procedures are exhausted.
>
> 782 F.2d at 681.

9. The six-month statute of limitations is also tolled as to the employer defendants while plaintiffs were pursuing union remedies. To hold otherwise would force the

plaintiffs to bring two separate lawsuits: First, against the employer within the six-month statute of limitations, and, Second, against the union, once internal union remedies were exhausted. To avoid this type of piecemeal litigation, the court in *Delcostello* settled on the statute of limitations period to avoid "establishing different limitations periods for the two halves." 462 U.S. at 169, fn. 19. Similar reasoning was followed by the court in Frandsen in holding that the statute of limitations is tolled as to the employer while plaintiffs pursue their union remedies.

10. In a recent decision under the analogous Railway Labor Act, the Fourth Circuit held that the statute of limitations does not begin to run until internal union remedies are exhausted:

> Generally speaking, "a cause of action for breach of the duty of fair representation accrues at the point where the grievance procedure has been exhausted or otherwise breaks down to the employee's disadvantage. It is only at this point that the employee is cognizant of any alleged breach of the duty owed him by the union. *Hayes v. Reynolds Metals Co.*, 769 F. 2d 1520, 1522 (11th Cir. 1985) (per curiam).
>
> *Dement v. Richmond, Fredericksburg & Potomac Railroad Company*, 845 F. 2d 451, 460 (4th Cir. 1988).

11. Any reasonable effort by the plaintiffs to exhaust remedies, however futile, tolls the statute of limitations. *Frandsen v. Brotherhood of Railway Airline and*

Steamship Clerks, 782 F.2d 674 (7th Cir. 1986). The efforts by plaintiff Walker to pursue grievance and other internal union remedies were entirely reasonable under the circumstances and tolled the limitations period until at least September 16, 1986. This suit was filed well within six months of that date. *See*, e.g., *Lewis v. International Brotherhood of Teamsters Local 771*, 826 F.2d 1310 1318 (3rd Cir. 1987) ("the time for suit should not begin to run until 'the futility of appeals [becomes] apparent'"), *citing*, *Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 685-89 (1981). Where the employee makes a good faith attempt to rectify the contract breach, prior to suit, his actions toll the statute. *Adkins v. International Union of Electrical, Radio, and Machine Workers*, 769 F.2d 330, 336 (6th Cir. 1985); *Scott v. Local 863*, 725 F.2d 226, 229 (3rd Cir. 1984); *Frandsen, supra.*

B. Exhaustion of Internal Union Remedies. (Paragraph 2 of Memorandum of Decision).

12. At the time this suit was filed, an internal union grievance initiated by plaintiff Walker and others was pending. Walker testimony, Exhibits 6, 7. Plaintiffs were not required to exhaust this internal dispute resolution procedure before filing suit because that procedure was incapable of affording plaintiff the relief sought. Any resolution reached between plaintiffs and Local 71 would not have been binding on the employer. *See Warner v. McLean Trucking Co.*, 574 F. Supp. 291 (S.D. Ohio 1983).

13. While the union defendant contends that plaintiffs should have filed their action within six months of March 20, 1986, it also claims that plaintiffs failed to exhaust internal union remedies before filing suit. Ignoring

the inconsistency of this position, plaintiffs are not barred from filing suit by their failure to finish out every possible internal union remedy. As the Supreme Court has noted, at some point exhaustion efforts become futile, and "the member ... [may become] ... exhausted instead of the remedies...." *NLRB v. Marine Workers Local 22*, 391 U.S. 418, 425 (1968).

C. "Arbitrability" of the Contract Provision.
(Paragraphs 3 and 4 of Memorandum of Decision).

14. The plain language of Article 52, § 3 required that the new mileage system be put into effect within six months of contract ratification, or by December 1, 1985. The drivers are entitled to receive compensation based upon the terminal-to-terminal mileage rates as of December 1, 1985, regardless of when the actual recalibrations were completed, and regardless of whether the parties consider the miles measured to be "spur" or "trunk" miles. Unless the six-month provision of Article 52 § 3 is deemed to require payment by the terminal-to-terminal method by December 1, 1985, the contract language is meaningless, for it would permit the employer to delay payment interminably.

15. The defendants contend that the Bi-State Committee was simply "interpreting" the Carolina Supplement and was not modifying it, when it ruled on March 20, 1986, that the new mileage rates would be implemented on May 4, 1986. They argue this in the face of clear language in Article 52, Section 3 providing that "within six months of the effective date of this Agreement, the parties will convert the mileage from zero point to terminal by jointly checking the miles to each terminal." (Emphasis added.)

16. The action by the Bi-State Committee does not draw its essence from the contract and is not entitled to the deference typically afforded arbitration decisions.

17. Moreover, the Bi-State Committee exceeded its authority when it ruled on March 20, 1986, that implementation would be delayed until May 4, 1986. No provision of the contract gave the committee authority to extend implementation beyond the six-month deadline specifically established by the contract.

18. Where a grievance committee exceeds its authority and amends, rather than interprets an agreement, deference to the committee decision is not warranted. See *Warner v. McLean Trucking, Supra.*

19. The reason the defendants have tried so hard to cast the Bi-State Committee's action as an "interpretation" of the contract is to take advantage of a recent Supreme Court decision that gives arbitral bodies wide discretion in hearing evidence, finding facts, and interpreting disputed contract provisions. In *United Paperworkers v. Misco*, __ U.S. ___, 108 S.Ct. 364 (1987), the Court held that the factual basis for an arbitrator's decision is not subject to review by federal courts absent fraud or misconduct in the arbitration process.

20. The *United Paperworkers* decision in no way altered the axiom that arbitrators can only interpret contracts and have no authority to modify them. *Warner v. McLean Trucking Company, Supra; See also, Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S.

574, (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

21. An arbitral body such as the Bi-State Committee has authority to interpret a contract, but the committee cannot rewrite the terms of the contract by altering express language. In this case, the six-month deadline specified, by the Carolina Supplement language left no room for interpretation and no gaps to be filled by the Bi-State Committee. If mileage calibrations could not be completed and approved by the six-month deadline, then pay adjustments should have been made retroactive to the deadline. Indeed, when the Bi-State Committee made its ruling on March 20, 1986, it specified that employers that had not implemented the new mileage rates by May 4, 1986, would pay drivers retroactively to that date. Employers in fact did give retroactive pay for terminal-to-terminal mileage once it was implemented. Thus, the employers were clearly capable of calculating retroactive pay, and the Bi-State Committee recognized that retroactive pay could be required in the implementation of terminal-to-terminal mileage.

22. In summary, the defendants' efforts to justify not making pay adjustments retroactive to the six-month deadline specified by the contract simply cannot be dismissed as a mere "interpretation" of the contract. *United Paperworkers* in no way bars this court from reviewing illegal contract modifications, violation of members' right to vote on ratifications, and the defendants' conduct in so acting. The Bi-State Committee was not merely "interpreting" the contract language, it was modifying its express substantive provisions without a required ratification vote by the affected union members.

D. The Duty of Fair Representation.
(Paragraphs 5 and 6 of Memorandum of Decision).

23. A union's duty to represent its members fairly is a judicially created doctrine, derived to balance the union's exclusive representation of its members, set forth in Section 9(a) of the National Labor Relations Act, 29 U.S.C. 185(a). With this exclusive authority comes a responsibility to the individual members, whose individual bargaining rights are correspondingly limited. Under the seminal decision of *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court described the duty of the union "to serve the interests of all members without hostility or discrimination to any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177.

24. The Fourth Circuit has held that a breach of the duty can arise from a breach of any one of the obligations outlined in Vaca. *Griffin v. International U., United Automobile, A.& A.I.W.*, 469 F.2d 181, 183 (4th Cir. 1972). ("While negligence in handling grievances has not been identified as breaching the union's duty of fair representation, ... the courts have adopted the position that a union may not arbitrarily ignore a meritorious grievance or handle it in a perfunctory manner."); *see also Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir. 1980) (to sustain a union member's action against a union for failure to provide fair representation, it is not necessary that the union's breach be intentional. "A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct ... that the conduct could be equated with arbitrary action.")

25. Applied to the facts of the instant case, it is apparent that the union breached its duty of fair representation in several ways, including:

26. First, it failed to seek timely implementation of the provisions of the 1985 contract in a diligent fashion. Between ratification of the contract in May and the first implementation meeting four months later in September, it did nothing at all. The company and union defendants failed to produce any evidence showing reasonable steps taken by it in the first four months following ratification of the Carolina Supplement to assure that mileage conversion would occur within the prescribed six months. Throughout, the union acted arbitrarily in the face of clear contract language requiring it diligently to seek implementation of terminal-to-terminal mileage within six months. Its actions were grossly negligent toward union members' interests.

27. At the September 9 Negotiating Committee meeting and thereafter, the union failed to raise the issue of pay by the contract date of December 1, 1985, despite the fact that it was clear that the measurements would not be completed by that date.

28. Moreover, in participating in modifying the agreement in the March,20, 1986, Bi-State Committee decision, the union again failed to protect the members' interests and, without securing any advantage, negotiated away a provision of extreme importance to the members. There is no evidence in the record showing that the union defendants did anything other than acquiesce in the delayed implementation of the new mileage rates.

29. In addition, the union representatives to the Negotiating Committee negligently delegated their duties to the mileage subcommittee without establishing any review mechanism for the subcommittee work to assure that the new mileage system would be implemented by December 1. The Carolina Negotiating Committee, consisting of union and employer representatives, unlawfully modified the contract by agreeing to give priority to trunk mileage recalibration over spur mileage recalibration and delegating the final say over the implementation date of the new mileage system to the Bi-State Committee, thereby effectively setting aside the six month mileage adjustment provision of the contract which had been ratified by the union membership. The union then negligently agreed to allow the Bi-State Committee to hear a grievance on the issue of when the mileages would be paid, in spite of the fact that the contract clearly provided when the mileages would be paid. At that committee hearing, they failed to argue that the pay should be effective on December 1, 1985, as the contract provided. Similarly the union acted negligently in establishing the mechanism for measurement of mileages, because their representatives recognized that completion by the contract date was impossible, yet agreed to measure all of the trunk mileages first, and took no steps to speed up the measurement process.

30. Further, in failing to submit the modification to the members for a vote, it again breached its duty.

31. Finally, the union delayed hearing Walker's grievances, while at the same time acquiescing in the contract modifications that went to the heart of his grievance. Thus, the union acted against the interests of Walker and all

other members seeking the proper implementation of the terminal-to-terminal provisions.

* * * *

32. Shoddy or inept negotiating may not contravene a union's duty to represent its membership fairly. Here, however, the union's actions were worse than negligent. Local 71 completely failed to represent the members' wishes and secured no advantage for the members when they agreed to delay implementation.

33. Without ever calling for a ratification vote or objecting to the authority of the Bi-State Committee to change the implementation date, the local union left the issue of the implementation date to the Bi-State Committee, which had no power to negotiate changes in the agreement. Though Local 71 officials must have recognized by December 1 that the process had broken down, Sides stated that even at the time of the March, 1986, grievance hearing he expected payments to be retroactive to December 1, 1985. Yet the union representatives at the March meeting failed to even raise the issue of retroactivity! Sides deposition, pp. 99-100, 106, 118, 135, 139; Stipulated facts, para. 62, 64. Most surprisingly, though 90% of the runs had been calibrated by March 20, the union agreed without objection to a further six week delay in payment. The union's concession on March 20 had a tremendous impact upon the drivers, but no reciprocal benefit was received in return. In short, the union simply gave away the drivers' entitlement to five months of terminal-to-terminal pay without a word of protest and without receiving anything in exchange.

34. A union's duty of fair representation is breached by arbitrary or grossly negligent negotiation of contracts. Thus, for example, in *Trail v. International Brotherhood of Teamsters*, 542 F.2d 961 (6th Cir. 1976), the court found that a claim that a union had negotiated a wage rider that was below the already nationally negotiated contract level, and in violation of the union constitution, "knowing that it would be rejected by the membership," stated a cognizable claim for relief for violation of the union's duty of fair representation. *Id.* at 968.

35. Failure to comply with terms of the IBT Constitution requiring a ratification vote is a violation of the duty of fair representation. When a union negotiates an agreement or modification and then fails to obey its constitution and submit the negotiated change to the membership for a ratification vote, the union has breached its duty to represent the members fairly. In a case similar to the one before the court, a business agent agreed to a project which the members had twice rejected, and in contravention of the parent union's constitutional rights, which required that all collective bargaining agreements be approved by a majority of the affected locals. The court held that it was a "paradigm breach of this duty" of fair representation. *Alexander v. International Union of Operating Engineers*, 624 F.2d 1235, 1240-41 (5th Cir. 1980).

36. In *Conroy v. Teamsters Local 705*, 124 LRRM 3240 (N.D.Ill. 1985) the defendant unions had negotiated a mid-term change of the seniority system without informing the members and without submitting the change to the members for a vote. The court thus found an issue of fact as to whether the union had breached its duty. *See also, Teamsters Local 310 v. NLRB*, 587 F.2d 1176 (D.C. Cir.

1978), and *Warehouse Union, Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981).

37. In *Livingston v. Ironworkers Local 812*, 647 F.Supp. 723 (W.D.N.C. 1986), the court recognized that a union's unfair conduct of a ratification vote implicated the union's duty of fair representation, because the members had been given inadequate notice of the agreement's signing, and voided the agreement. Because the union here was clearly acting in contravention of the members' interests, the union violated its duty to represent all of the members interests by failing to conduct such a vote.

38. The union breached its duty of fair representation in its delay in processing Walker's grievances. The grievances that Herman Walker filed in February and May concerning implementation of terminal-to-terminal mileage clearly had merit. The union and employer defendants acknowledge that implementation of terminal-to-terminal mileage was a major issue and that considerable time was devoted to it. Nevertheless, Walker's grievances were not heard until September 16, 1986, many months after they were filed. In *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), the court held that the failure to process an arguably meritorious grievance is evidence of bad faith sufficient to overcome a union's motion for a directed verdict in a breach of fair representation action. The Fourth Circuit in *Zimmerman v. French International School*, 830 F.2d 1316 (4th Cir. 1987) followed similar reasoning in holding that the inference of bad faith created by delay was sufficient to defeat a union motion for summary judgment. When all of the circumstances leading to delayed implementation of the terminal-to-terminal mileage

provisions in this case are considered together, the court concludes that there has been an arbitrary and capricious disregard for the contract and statutory rights of plaintiffs by the union defendants.

39. The employer defendants are liable for breach of contract because they knowingly agreed to circumvent the contract ratification procedures and modified the mileage adjustment provision of the contract without submitting the modification to the union membership for a ratification vote.

40. The amendment of the agreement in this case resulted in a breach of the wage provisions of the 1985 contract. Because the amendment was secured illegally by violation of the IBT Constitution, and through the Bi-State Committee, which acted without authority to negotiate contract amendments, the employer is estopped from relying on the amendment as a defense to his breach of the agreement.

41. It is well recognized that where an employer has had notice of the lack of authority of the union to enter into an agreement, no agreement is reached. *O'Mara v. Erie Lackawanna R.R.Co.*, 407 F.2d 674, 679 (2nd Cir. 1969), *aff'd, Czosek, et al. v. O'Mara, et al.*, 397 U.S. 25 (1970). Where the employer has knowledge of the ratification requirement, and this is the basis for the fair representation claim, the employer may also be found liable for breach of the contract or for having joined in the fair representation breach. *Sako v. Teamsters Local 705*, 125 LRRM 2372 (N.D.Ill. 1987). In *Sako*, the court held that if the union were found to have breached its duty of fair representation in conduct of a ratification vote, the employer could be held liable for a continuing breach of the contract, by paying

wages at concessionary level agreed upon by the union or by joining in the fair representation breach. In *Goclowski v. Penn Central*, 571 F.2d 747 (3rd Cir. 1977), and *Rubberworkers Local 670 v. Rubberworkers*, 125 LRRM 2969 (6th Cir. 1987), the courts found that companies joined with the union representatives in their fair representation breaches.

42. Article XII(E) of the Teamsters Constitution mandates that all employers with Teamster contracts be provided with copies of all provisions of the Constitution requiring ratification. The employers have provided no evidence to suggest that they were unaware of this requirement, and in fact with their long bargaining history with the local union, it is assumed that they were aware of the ratification requirement. In addition, the employers have made no allegation that they relied on the union's apparent authority to enter into the agreement. Here, where the employer was also a party to the illegal negotiations procedures, they may be deemed to be aware that the contract modification was unlawful. *See*, e.g., *Parker v. Teamsters Local 413*, 501 F.Supp. 440, 450 (S.D. Oh. 1980) *aff'd. without op*, 657 F.2d 269 (6th Cir. 1981), (employer breached collective bargaining agreement by implementing flexible workweek after it had participated in conduct which caused ratification election to be meaningless).

E. Breach of Contract
(Paragraphs 6 and 7 of Memorandum of Decision).

43. Defendants' decision to delay implementation of terminal-to-terminal mileage until May 4, 1986, without paying drivers retroactively to October 1 or December 1,

1985, amounted to an illegal mid-term modification of the collective bargaining agreement.

44. Defendants breached plaintiffs' contractual rights by delaying the time specified in the Carolina Supplement for implementation of terminal-to-terminal mileage without the ratification vote required by the IBT Constitution. Plaintiffs are therefore entitled to relief under both § 301 of the LMRA and §§ 101(a) of the LMRDA, 29 U.S.C. §§ 185 and 411. The union's failure to submit the contract modification created by the Bi-State Committee decision to the affected members for a ratification vote violated section 101(A)(1) of the LMRDA. *Sako v. Teamsters Local 705*, *Supra.*; *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984).

45. Plaintiffs and other union members are entitled to an equal right to vote in union referenda, pursuant to 29 U.S.C. §411(a)(2). Although this statutory provision does not require that any particular matter be submitted to union members for their ratification, if the union's constitution and bylaws require ratification, those constitutional provisions are enforceable under this section.

46. The International Brotherhood of Teamsters Constitution accords plaintiffs the right to vote on mid-term contract modifications. The Constitution also requires that employers negotiating contracts with the unions be apprised of the ratification requirements.

47. Under the LMRDA, 29 U.S.C. § 401 *et. seq.* (1982), unions have an affirmative duty to ensure that "[e]very member of a labor organization shall have equal rights and privileges within such organization to nominate

candidates, to vote in elections or referendums of the labor organization ...." 29 U.S.C. § 411(a)(1)(1982).

48. This "equal rights" provision is part of the union members' Bill of Rights, contained in Title I of the LMRDA. The LMRDA, enacted in 1959, was a direct result of hearings of the Senate Select Committee on Improper Activities in the Labor or Management Field, known as the McClellan hearings. The hearings disclosed massive corruption controlling certain American labor unions, particularly the Teamsters and the Longshoremen. Much of the testimony focused on the ties between union corruption and inadequate membership representation. The hearings included testimony on Union officers who negotiated contracts in disregard or even defiance of their members' wishes. *See* Morris (ed.), *The Developing Labor Law* (2d ed. 1983), pp. 49-60 for a summary of legislative history leading to LMRDA enactment.

49. Title I of the LMRDA was broadly fashioned after the Bill of Rights of the United States Constitution to remedy problems of inadequate representation of union members. It was designed to enable "the members ... to determine the course of their organization ..." *Navarro v. Gannon*, 385 F.2d 512, 518 (2nd Cir. 1967). To achieve that purpose, courts have recognized that under the equal rights provision of Title I, union members may enforce constitutional provisions that provide them with a ratification vote on contracts or contract modifications. See, *Bunz v. Moving Picture Machine Operators Local 224*, 567 F.2d 1117 (D.D.C. 1977) (enforcing the bylaws provision requiring a two-third vote for assessment, and invalidating union adoption of an assessment with a 59% majority); *American Postal Workers Union Local 6885 v. APWU*, 665

F.2d 1096, 1108 (D.C. Cir. 1981) (where local union was excluded from ratification vote in violation of constitution, Section 101(a)(1) was violated); and *Christopher v. Safeway Stores*, 644 F.2d 467, 468-71 (5th Cir. 1981) (because union's constitution provided that all 'major propositions' affecting the local union must be approved at a membership meeting, and no vote was taken, Title I was violated). *See also, Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984); *Sako v. Teamsters Local 705*, 125 LRRM 2372 (N.D. Ill. 1987).

50. The teamsters have frequently used the mid-term modification provisions in the IBT Constitution to provide members with a vote. Several courts have recently examined the Constitutional language in Article XII and have determined that a ratification vote was called for under the facts presented. Thus, in *Sako v. Teamsters Local 705, supra,* the court examined the claims of members who alleged that the union utilized improper procedures in a ratification vote. In denying the union's claim that the court had no jurisdiction because the parties had no right to a referendum, the court examined the local bylaws and the Teamsters Constitution, and found that such a right was present. In *Conroy v. Teamsters Local 705*, 124 LRRM 3240 (N.D. Ill. 1985), the court found that a negotiated change in bidding procedures had not been submitted to the members, and found that an issue of fact as to whether the union's duty to fairly represent the members existed, because "proper voting and disclosure had not been followed." *Conroy* is especially significant because the negotiated change at issue was not a change in contract language. Rather, it was a change in past practice between the employers and the union. *See also, Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984) (midterm modification of the

national UPS contract improper under Teamsters Constitution; members deprived of meaningful vote because of short discussion period); *Barker v. Teamsters Local 413*, 501 F.Supp. 440 (S.D. Oh. 1980), *aff'd without op.*, 657 F.2d 269 (6th Cir. 1981).

51. The cases referred to above, as well as *Lewis v. Teamsters Local 771*, 826 F.2d 1310 (3rd Cir. 1987), show that ratification votes are common in the union, for everything ranging from a reopening of a national agreement *(Bauman, supra)*, to a change in the procedures road drivers use to vote on their bids *(Conroy, supra)*, or hold seniority. A ratification vote should have been held before implementation of terminal-to-terminal mileage was delayed. The evidence in the record establishes that terminal-to-terminal pay was a major "improvement" in the 1985 [sic] and the union's negotiation of a later implementation date was a form of wage concession. The importance of the change to the drivers cannot seriously be derided by the union, because it was the very first change that President Sides announced to the members at the meeting concerning the 1985 Carolina Supplement. Walker, Colesworthy and Slaughter testimony.

52. In delaying implementation, the grievance committee created a significant change in the contract language, and deprived the affected members of a long sought term and condition of employment.

53. By refusing to implement the new mileage pay system by the date required in the contract, and by failing to pay the mileages from the date set forth in the contract, the defendant employers breached the collective bargaining agreement.

54. By knowingly agreeing to circumvent the contract ratification procedures, the employers joined with the union defendant in their breach of the duty of fair representation. *Rubberworkers Local 670 v. Rubberworkers, Goclowski, Sako*, supra.

Dated: May 5, 1989.

James B. McMillan
United States District Court Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-86-462-M

HERMAN WALKER, BRADLEY COLESWORTHY, TERA B. SLAUGHTER and THOMAS DILLON,

Plaintiffs,

-vs-

TEAMSTERS LOCAL 71, CONSOLIDATED FREIGHTWAYS, INC., TRANSCON INC., PIE NATIONWIDE,

Defendants.

Based upon the findings of fact and conclusions of law set forth in the accompanying memorandum, the court enters judgment as follows:

1. The employer defendants are ORDERED to pay back pay based upon gate-to-gate mileage to affected drivers retroactive to December 1, 1985;

2. The court will leave to the parties the task of calculating and distributing back pay. However, the court will retain jurisdiction in the event that disputes arise as to the proper calculation or distribution of back pay; and

3. Counsel for plaintiffs are directed to file their motion for attorney fees within 45 days. The issue of apportionment of attorney fees among the defendants will be resolved by the court when it rules upon plaintiffs' motion for attorney fees. If defendants appeal this judgment prior to that time, then the motion for attorney fees need not be filed until all matters on appeal have been resolved.

This 8 day of May, 1989.

James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1041

HERMAN WALKER; BRADLEY COLESWORTHY; TERA B. SLAUGHTER; THOMAS DILLON,

Plaintiffs - Appellees,

versus

CONSOLIDATED FREIGHTWAYS, INC.; TRANSCON, INC.; PIE NATIONWIDE,

Defendants - Appellants,

and

TEAMSTERS LOCAL NO. 71; TEAMSTERS LOCAL NO. 28; TEAMSTERS LOCAL NO. 61; TEAMSTERS LOCAL NO. 391; TEAMSTERS LOCAL NO. 509; TEAMSTERS JOINT COUNCIL NO. 9; TRUCKING MANAGEMENT, INC.; CAROLINA TRUCKING ASSOCIATION, INC.,

Defendants.

No. 89-1044

HERMAN WALKER; BRADLEY COLESWORTHY; TERA B. SLAUGHTER; THOMAS DILLON,

Plaintiffs - Appellees,

versus

TEAMSTERS LOCAL NO. 71,

Defendant - Appellant,

and

CONSOLIDATED FREIGHTWAYS, INC.; TRANSCON, INC.; PIE NATIONWIDE; TEAMSTERS LOCAL NO. 28; TEAMSTERS LOCAL NO. 61; TEAMSTERS LOCAL NO. 391; TEAMSTERS LOCAL NO. 509; TEAMSTERS JOINT COUNCIL NO. 9; TRUCKING MANAGEMENT, INC.; CAROLINA TRUCKING ASSOCIATION, INC.,

Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, Senior District Judge. (CA-86-462-C-C-M)

Argued: March 6, 1990 Decided: April 11, 1991

Before HALL, SPROUSE, and WILKINS, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Hall wrote the majority opinion, in which Judge Wilkins joined. Judge Sprouse wrote a concurring and dissenting opinion.

ARGUED: Melvin R. Manning, MANNING, DAVIS & KIRBY, Richmond, Virginia; Hugh J. Beins, BEINS, AXELROD, OSBORNE & MOONEY, P.C., Washington, D.C., for Appellants. Paul Alan Levy, PUBLIC CITIZEN LITIGATION GROUP, Washington, D.C., for Appellees. **ON BRIEF:** F. William Kirby, MANNING, DAVIS & KIRBY, Richmond, Virginia; Jonathan G. Axelrod, BEINS, AXELROD, OSBORNE & MOONEY, P.C., Washington, D.C., for Appellants. Edward G. Connette, III, GILLESPIE, LESESNE & CONNETTE, Charlotte, North Carolina; Julie Fosbinder, Tucson, Arizona, for Appellees.

HALL, Circuit Judge:

Plaintiffs, Herman Walker, Bradley Colesworthy, Tera Slaughter, and Thomas Dillon, are truck drivers who are represented by Teamsters Union Local No. 71. They initiated this action below against their employers, their union, and several different locals, alleging that their employers had breached their collective bargaining agreement by not timely implementing a new mileage measuring system and that the union had breached its duty to fairly represent them by agreeing to a contract modification without the assent of the union members. Plaintiffs seek to have the relevant provision of their collective bargaining agreement applied retroactively to December 1, 1985, rather than to May 4, 1986. The court certified a class of over-the-road truck drivers represented by

the named plaintiffs and, following a bench trial, ruled that Local 71 had breached its duty of fair representation to the class. The court also held that three trucking companies -- Consolidated Freightways, Inc., Transcon, Inc., and PIE Nationwide -- had breached their collective bargaining agreement with the plaintiff class. The union and the employers appeal. We affirm in part and reverse in part.

I.

This dispute arose in North Carolina, where the defendant trucking companies have freight terminals. Two collective bargaining agreements govern the parties' working relationship: the National Master Freight Agreement (NMFA) and the Carolina Over-The-Road Supplemental Agreement (Carolina Supplement).[1] Under these agreements, drivers' wages are calculated by applying a negotiated mileage rate to the number of miles driven. Historically, distances were measured between specified places within cities, called "zero mileage points." The distance between zero mileage points was often called "post office to post office" mileage or "AAA" mileage, because the "zero mileage point" for many cities was located at the post office and American Automobile Association figures were used for guidance. Prior to 1985, any dispute about the proper mileage was resolved under Article 52, section 2 of the Carolina Supplement, entitled "Mileage Determination." That section required that disputes be submitted to the Joint Bi-State Area Committee (Bi-State Committee), a body composed of an equal number of union

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[1]The Carolina Supplement applies to most of the Teamsters' locals in the Carolinas.

and employer representatives and created to resolve contract disputes arising under the Carolina Supplement.

In March 1985, the 1982-1985 NMFA and Carolina Supplement expired. Soon thereafter, the union and employers negotiated a new agreement, which union members ratified on May 17, 1985.[2] Pursuant to this new agreement, the mileage system was to change from "post office-to-post office" to "terminal-to-terminal," under which drivers would be paid for mileage from the gate of the terminal of origin to the gate of the terminal of destination. Sections 2 and 3 of Article 52 of the Carolina Supplement incorporated this change. They provide:

> Section 2. Mileage Determination.
>
> Mileage shall be computed on official AAA mileage. Where a dispute arises, it shall be filed with the Bi-State Grievance Committee. The Employer and the Union shall then jointly log the mileage from terminal to terminal, and the results reported to the Bi-State Grievance Committee. Once this mileage is established, it shall immediately be applied to all runs operated over that particular route by all Employers

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[2]In addition, a "Stipulation and Agreement" provided that non-monetary provisions of the new agreement would not become effective until ten (10) days after notification of ratification was given to the motor carriers. Notification of ratification was given on or about May 17, 1985, resulting in an effectivity date of approximately May 27, 1985.

operating between those two points. No Employer shall change its present mileage pay until the above procedure has been followed, unless such change is agreed to by the Local Union involved. The speedometer of any measuring automobile must be calibrated prior to any measurement. Any change in mileage resulting from the above procedure shall not result in any retroactive pay to a driver or refund from a driver.

Section 3. Mileage Adjustment.

Within six (6) months of the effective date of this Agreement, the parties will convert the mileage from zero point to terminal by jointly checking the miles to each terminal. It is understood the parties will establish a common checkpoint outside the terminal city and determine the difference in distance between the zero point and the terminal. Once the difference is established, the mileages will be adjusted. It is further understood that any disputed over-the-road mileage between points will also be determined.

Certain drivers believed that previously-accepted "trunk" miles were inaccurate and needed to be measured along with the measurement of "spur" miles.[3] The

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[3]"Trunk" miles are the distances between zero mileage points, and "spur" miles are the distances from the zero points to the terminals.

employers disagreed, believing that only "spur" miles needed to be calibrated. These drivers resolved their dilemma by claiming a disagreement over all the lines between all cities covered by the Carolina Supplement, thus creating the "dispute" needed to implicate sections 2 and 3 of the contract calling for the determination of "disputed" trunk distances. On September 4, 1985, Charles Williams, a member of Local 391, filed a grievance that placed all such miles in dispute, thereby initiating a procedure that would decide the correct mileage for all trunk routes covered by the Carolina Supplement.[4] Williams admittedly initiated the grievance with the sole objective of having all such distances measured.

In response to Williams, grievance, the Carolina Negotiating Committee, composed of an equal number of union and employer representatives, met on September 9, 1985, and named a Mileage Subcommittee to begin the work of calibrating all trunk and spur miles. The Negotiating Committee, however, elected to measure trunk miles first. The Negotiating Committee also established guidelines for the Subcommittee's work. These guidelines provided, in part:

> [The Mileage Subcommittee w]ill submit completed mileage checks to the Bi-State Committee on November 20 and such mileages are to be implemented by the carriers on December 1. Mileage checks

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[4]Local 391, originally a party to the action, is not a party in this appeal. Williams' grievance, nevertheless, resolved the mileage measurement issue as to all involved locals, including Local 71.

completed after November 20 will be submitted to the Bi-State on a monthly basis.

Shortly before September 25, 1985, Conrad Sides, President of Local 71, invited all Local 71 road stewards to discuss the Negotiating Committee. guidelines. At this meeting, no one objected to any guideline.

Mileage calibration began on October 21, one month before the calculations were scheduled for submission to the Bi-State Committee. The calibration task evolved into a difficult and lengthy project and was not completed by December 1, 1985.

On February 17, 1986, Herman Walker, a member of Local 71 and a shop steward for Consolidated Freightways' road drivers, filed a "class action grievance" on behalf of all over-the-road drivers covered by the Carolina Supplement. His grievance stated that the employers had not implemented the new mileage figures and requested that carriers be required to pay drivers retroactively to December 1, 1985, under the terminal-to-terminal system. One week later, Walker filed a related grievance, formally asking to receive notice of and to attend the hearing on his February 17, 1986, grievance.

On March 20, 1986, the Bi-State Committee received and accepted the report of the Mileage Subcommittee. The record of the proceedings reveals no specific discussion of the grievances filed by either Williams or Walker. At this meeting, however, the Bi-State Committee entered the

following decision: "[m]ileages are accepted as submitted and shall be effective May 4, 1986.[5]

On May 9, 1986, Local 71 submitted Walker' s grievances to the Bi-State Committee, summarized as follows:

> On September 9, 1985, the Carolina Negotiating Committee met to set forth rules, regulations, and guidelines that were to be followed in logging miles from terminal to terminal. It was agreed the mileage checks would be submitted to the Bi-State Grievance Committee on November 20, 1985 and implemented by all carriers on December 1, 1985. The Union is requesting all new mileage figures be rolled back to and paid to all drivers retroactive to December 1, 1985 just as the carriers agreed to on September 9, 1985.

On May 12, after terminal-to-terminal mileage went into effect, Walker filed another grievance on behalf of himself and forty-one other drivers, again requesting the new mileage figures be applied retroactively to December 1, 1985. In July 1986, Walker filed an additional grievance protesting the mileage figures used by Consolidated Freightways and protesting Consolidated's delay until June 29, 1986, in implementing the new mileage figures.

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[5]After the Bi-State Committee received the Mileage Subcommittee's report, members of the Bi-State Committee voiced their approval. The Bi-State Committee then went off the record before entering its decision.

On September 16, 1986, the Bi-State Committee heard Walker's grievances. At this proceeding, Walker, who was represented by Local 71's business agent, conceded that Consolidated had implemented terminal-to-terminal mileage with payments retroactive to May 4, 1986. However, he asserted that recalculated mileage should be applied retroactively to December 1, 1985. The Bi-State Committee disagreed, concluding:

> Based on the evidence that the Company is in compliance with Article 52, Section 2 and the decision of this committee [on March 20, 1986] and further that the minutes of the September 9, 1985 meeting of the Carolina Negotiating Committee are merely guidelines, the claim is denied.

In short, Walker's grievances failed to result in a longer retroactive pay period.

II.

On October 14, 1986, Walker, Slaughter, Dillon, and Colesworthy filed this action against Local 71, Consolidated Freightways, Transcon, PIE Nationwide, and others.[6] They alleged (1) breach of the union's duty of fair representation, (2) breach of the collective bargaining agreement by their

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[6]The complaint originally named as defendants Teamsters Locals 71, 28, 61, 391, and 509; Teamsters Joint Council No. 9; Consolidated Freightways, Transcon, Inc., and PIE Nationwide; and two employers' organizations, Trucking Management, Inc., and Carolina Trucking Association, Inc. The district court subsequently dismissed all the defendants except the three employers and Local 71. The dismissals are not at issue in this appeal.

employers, (3) violations of Section 301 of the Labor-Management Relations Act, and (4) violations of Section 101(a) of the Labor-Management Reporting and Disclosure Act (LMRDA).[7]

After a bench trial in May 1988, the district court summed up the basis of the dispute, stating:

> The heart of the controversy is allegations and evidence that the union, Teamsters Local No. 71, agreed to changes in plaintiffs' collective bargaining agreement without giving affected union members their right to vote on those modifications.

Reduced to its essentials, the district court's decision held that the Bi-State Committee's action constituted an amendment, not an interpretation, of the collective bargaining agreement. According to the court, "[t]he plain language of Article 52, § 3 [of the Carolina Supplement] required that the new mileage system be put into effect within six months of contract ratification, or by December 1, 1985." Therefore, the district court determined that the Bi-State Committee exceeded its arbitral authority when it modified the contract to allow the employers to implement the new mileage system after December 1, 1985. As a result, the district court concluded that the union breached its duty of fair representation to its members when it assented to this "renegotiation of the collective bargaining agreement"

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[7]Internal union charges had been filed a month earlier, but the international union has not processed these claims pending the outcome of this litigation.

without seeking approval or ratification from its union members.[8]

In addition, the district court held that Local 71 violated its duty of fair representation when it "failed to seek timely implementation" of the mileage provisions; when it "negligently delegated (its) duties to the mileage subcommittee"; when it "failed to raise the issue of pay" when it became clear that the calibration would not be completed on schedule; and when it delayed processing Walker's grievances. Concomitantly, the court held that the employers had breached the collective bargaining agreement, and entered judgment ordering the employers "to pay back pay based upon gate-to-gate mileage to affected drivers retroactive to December 1, 1985."

III.

In concluding that the Bi-State Committee's decision constituted an amendment of the Carolina Supplement, the district court acknowledged that an arbitral body[9] has authority to interpret a contract. It held, however, that the Bi-State Committee rewrote, rather than interpreted, express terms of the contract. We agree.

Courts, of course, cannot normally disturb an arbitral finding that draws its essence from the governing collective bargaining contract. *United Paperworkers Int'l Union,*

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[8]The governing provision of the union constitution requires that any modification of an existing collective bargaining agreement be ratified by a majority vote of union members affected.

[9]It is uncontested that the Bi-State Committee is the responsible body designated by the collective bargaining agreement to process grievances.

AFL-CIO v. Misco, Inc., 484 U.S. 29, 36 (1987). Merely because a court finds that the arbitrator has seriously misconstrued a contract is not a sufficient reason to set aside an arbitrator's decision. *Id.* This rule reflects the strong federal policy that private resolutions of labor disputes are favored. *Id.*

The court found that the language of Section 3 unequivocally states that the mileages will be implemented within six months of the agreement's effective date. The implementation delay was provided to allow time to recalculate the mileages, but even if the mileages were not recalculated by the end of six months, they were to be effective then.

The court also found that the language of the Contract makes no distinction between spur and trunk miles and allows for no deviation from the six-month effective date in order for both to be measured. The terms "trunk" and "spur" were first used in the Committee meeting on September 9, 1985, and the Committee elected to measure both. Though the Bi-State Committee is not empowered to modify or amend the provisions of the collective bargaining agreement, the mileage report, as submitted, did not contain any request for interpretation of the agreement. The Committee ruled merely that "the mileages are accepted as submitted and shall be effective May 4, 1986." We concur in the district court's conclusion that the Committee's decision did not "draw its essence" from the collective bargaining agreement. Thus, the Committee's decision amounted to a modification of the contract, rather than a permissible interpretation.

Local 71 was represented on the Bi-State Committee by Ken Bowman, its business agent. Though Bowman participated in the March 20, 1986, Committee decision, he made no argument that the pay for terminal-to-terminal mileage should be made retroactive to December 1, 1985. Therefore, we affirm the district court's finding of a breach of duty to fairly represent based on its theory that the contract was amended rather than interpreted.

IV.

The district court also found that Local 71 violated its duty of fair representation by: (1) failing to seek timely implementation of the provisions of the 1985 contract in a diligent fashion; (2) failing to submit the new May 4, 1986, implementation date to the membership for a vote; and (3) delaying Walker's grievance while simultaneously acquiescing in the new implementation date. Each of these grounds supports a claim of breach of duty to fairly represent.

We note that the standard for gauging a union's performance in this context has not varied greatly in the past decades. In *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), the Supreme Court stated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." In *Griffin v. Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972), we stated that "[w]ithout any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation."

In developing the standards articulated in *Griffin*, we later stated:

> To sustain a member's action against his union under *Griffin* standards, it is not necessary that the union's breach be intentional. A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members that the conduct could be equated with arbitrary action.

Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980). Malicious or egregious delay in pursuing plaintiffs' rights can violate the Vaca proscription.

We find the evidence sufficient to support the district court's conclusions; therefore, we cannot overturn on appeal. *Anderson*, 470 U.S. at 574-75. We affirm.

V.

Finally, the employers argue that the district court erred in certifying the plaintiff class to include all drivers covered by the Carolina Supplement,to the NMFA rather than just those represented by Local 71. We agree. Only employees represented by Local 71 have standing to sue it on the duty of fair representation and LMRDA § 101(a) claims. *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819, 821 (9th Cir. 1985). A local's duty of fair representation extends only to a class consisting of employees it represents. *Chambers v. McLean Trucking Co.*, 550 F. Supp. 1335, 1345-46 (M.D.N.C. 1982), *aff'd*, 701 F.2d 163 (4th Cir.), *cert. denied*, 462 U.S. 1133 (1983). Thus, employees not represented by Local 71 lack

standing to sue it either directly or as part of a class action. The class, as certified, includes employees not represented by Local 71. It is, therefore, overbroad as to the above claims.

Moreover, in order to recover for breach of a collective bargaining agreement, employees must establish that they first attempted to exhaust the agreement's grievance procedure. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). The evidence shows that employees represented by Local 71 have met this requirement, but does not show that employees represented by other locals have.

Finally, the trial court dismissed all of the locals, other than Local 71, and as stated in the court's own findings of fact, the class is composed only of drivers within Local 71. Therefore, it was error to define the class to include members of other locals. We reverse the court's judgment as it applies to employees not represented by Local 71.

AFFIRMED IN PART AND REVERSED IN PART

SPROUSE, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from the conclusion reached in Parts III and IV of the majority's opinion and would reverse. I concur in Parts I, II, and although I would not have reached the issue discussed in Part V, in my view, it is correctly resolved.

The district court correctly acknowledged that an arbitral body[1] has authority to interpret a contract. It held, however, that the Bi-State Committee rewrote, rather than interpreted, express terms of the contract. The majority agrees with that conclusion, but I cannot.

The majority concedes that courts normally cannot disturb an arbitrable finding that draws its essence from the governing collective bargaining contract. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987). As the Supreme Court stated:

> [T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Misco, 484 U.S. at 38. In holding that the arbitrator had not exceeded its authority, the *Misco* Court further stated that "[n]o dishonesty is alleged; only improvident, even silly, fact finding is claimed. This is hardly a sufficient basis for

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[1]The majority acknowledges that the Bi-State Committee is the responsible body designated by the collective bargaining agreement to process grievances.

disregarding what the agent appointed by the parties determined to be the historical facts." *Id.* at 39.

Similarly, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Supreme Court warned of the dangers of judicial intervention in an arbitration decision, stating:

> Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.

United Steelworkers, 363 U.S. at 598-99.

Application of the principles articulated in *United Steelworkers* and *Misco* compels me to disagree with the district court's conclusion that the grievance decision of March 20, 1986, did not draw its essence from the collective bargaining agreement. In arriving at this conclusion, I view differently the interpretative cohesiveness of sections 2 and 3. The former, virtually unchanged by the 1985 agreement, relates only to the measurement of distances between "zero mileage points." Significantly, this section provides that

"[a]ny change in mileage resulting from the above procedure shall not result in any retroactive pay to a driver or refund from a driver." And, as previously stated by the majority, this section required actual measurement only when a dispute arose.

Section 3 states that, within six months, the parties must convert the mileage from zero point to terminal. Like section 2, section 3 also requires measurement of "over-the-road" mileage (from city to city) in the event of a dispute over the distance between specific cities. Plaintiffs contend that Williams' grievance mandated calibration of all miles and that pay adjustments not made within six months after the effective date of the Carolina Supplement were to be paid retroactively. This contention, however, also reveals an inherent tension between sections 2 and 3. Section 2 did not require retroactive application, but, as the plaintiffs would interpret it, section 3 does. In my view, the language of sections 2 and 3 spawning this dispute is sufficiently ambiguous to permit interpretation. It presents the kind of dispute normally resolved through the agreed grievance procedures.

The drivers argue nevertheless that there is no authority in the disputed sections for the action of the Bi-State Committee advancing the retroactive date from December 1985 to May 1986. For that matter, however, there is no specific language fixing a retroactive date in the first place. The language of section 2 contained in the 1985 agreement states that "[n]o Employer shall change its present mileage pay until the above procedure has been followed, unless such change is agreed to by the Local Union involved." Section 3, in reference to the calculation of "spur" miles, states that "[o]nce the difference is established,

the mileages will be adjusted." The language of section 3 never specifically mandates retroactive pay adjustments, let alone a date for the adjustments.

While we might not necessarily agree with the Bi-State Committee's interpretation of the conflicting sections, "courts have no business overruling [an arbitrator] because their interpretation of the contract [or facts] is different from his." *United Steelworkers*, 363 U.S. at 599. The grievance machinery, as it was used here, falls considerably short of a perfect model. The mechanism employed for the resolution of mileage disputes, however, is one to which the union and employers have agreed in their collective bargaining contracts. Wise or unwise, efficient or inefficient, the parties' resolution of their dispute over the meaning of sections 2 and 3 of the collective bargaining agreement resulted in an arbitrable interpretation--not an amendment of the contract. Thus, in my view, the district court erred in concluding that the Committee's decision did not "draw its essence" from the collective bargaining agreement and in its finding of a breach of duty to fairly represent based on its theory that the contract was amended rather than interpreted.[2]

The district court also found that Local 71 violated its duty of fair representation by, in part, unnecessarily delaying the mileage calibration and by delaying the processing of Walker's grievance. I agree with the majority that the

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[2]Since, in my opinion, the contract had not been amended, it follows that the union did not violate either Section 301 of the Labor-Management Relations Act or Section 101(a) of the Labor-Management Reporting and Disclosure Act, as contended by the plaintiffs.

standard for gauging a union's performance in this context has not varied greatly in the past decades, and, of course, the majority correctly refers to the controlling principles of *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Griffin v. Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972); and *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980).

Malicious or egregious delay in pursuing plaintiffs' rights could be considered evidence of perfunctory conduct, unreasonableness, or even bad faith so as to constitute arbitrary action violative of the *Vaca* proscription. Here, however, no mystery surrounds the delays, and no evidence demonstrates unreasonable attitudes, unreasonable approaches, or arbitrary action on the part of either the union or 'the employers. Plaintiffs concede that Local 71 consistently contended that the contract language required conversion to terminal-to-terminal pay within six months of ratification and the record discloses that Local 71 advanced that position with fidelity. Local 71 also consistently contended that calibration of all miles, not just spur miles, must be completed within six months. However, the need to calibrate all miles, a development not contemplated by section 3, contributed greatly to the delay in the calibration process. Moreover, Local 71 believed that section 3 required retroactive pay and, thus, it did not foresee a sense of urgency in completing the process.

If Local 71 had pursued a tack different from the one it chose, the conversion time may have been shortened and the new mileage implemented within the six-month period or, failing that, there may have been ways it could have produced an interpretation of the contract requiring a retroactive implementation to December 1, 1985. However,

if these are failures on the part of the union, they do not rise to the level of bad faith and/or arbitrary action. As we stated in *Ash*:

> Simple negligence, ineffectiveness, or poor judgment is insufficient to establish a breach of the union's duty. Rather, the union's conduct must be "grossly deficient" or in reckless disregard of the member's rights....
>
> . . . .
>
> [A] flawless performance is not required to fulfill the union's duty.

Ash v. United Parcel Service, Inc., 800 F.2d 409, 411 (4th Cir. 1986) (citations omitted). Moreover, we observed in *Smith v. United Steelworkers of America, Local 7898*, 834 F.2d 93, 96 (4th Cir. 1987), "[a] union's exercise of its judgment need not appear as wise in the glaring light of hindsight, and a violation of the duty of fair representation is not made out by proof that the union made a mistake in judgment." Consequently, I would find no breach by the union as a result of the asserted delay.

Finally, in my view, plaintiffs' contention that Local 71 violated its duty by delaying Walker's grievance flies in the face of the stipulation of facts entered into by the parties.[3] Even without these admissions, no evidence

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[3]Prior to trial, the parties entered into a stipulation of facts, which included the following:

> 77. The delay in processing Walker's grievance was explained by Bowman. He was sick and was operated on in both March and April 1986. He didn't meet with Jenkins of

Consolidated until May, 1986, and he filed the grievance with the Bi-State Committee on May 9, 1986. The Committee didn't get to it in June; there was no meeting in July, and Bowman postponed it in August so that it could be heard as the first case in September, 1986.

80. On or about August 11, 1986, Walker and Local 71 Business Agent Ken Bowman met at Local 71's office to discuss the submission of the grievances to the Bi-State Committee.

81. Local 71 submitted the various Walker grievances to the Bi-State Committee on May 9, 1986. Local 71 summarized the grievances as follows:

On September 9, 1985, the Carolina Negotiating Committee met to set forth rules, regulations, and guidelines that were to be followed in logging miles from terminal to terminal. It was agreed the mileage checks would be submitted to the Bi-State Grievance Committee on November 20, 1985 and implemented by all carriers on December 1, 1985. The Union is requesting all new mileage figures be rolled back to and paid to all drivers retroactive to December 1, 1985 just as the carriers agreed to on September 9, 1985.

84. Walker had the opportunity to introduce whatever documents he desired and to speak freely while presenting Local 71's case.

85. Bowman did not do anything improper at the hearing on Case 259-R-86.

93. Walker could not identify any facts of collusion between the Unions and the Employers.

95. Walker does not accuse Sides, Bowman, or any official of Local 71 of any bad faith or wrongdoing in

suggests that the delays resulted from bad faith. Walker's grievances were interwoven with the ongoing procedures for pursuing the union's version of the meaning of sections 2 and 3 of the Carolina Supplement and securing to the advantage of its members the measurement of trunk miles. It is undisputed that Local 71 officials were as convinced as was Walker that the implementation date for the new mileage system should be retroactive to December 1, 1985. Nothing in the record indicates any reasons for the union to have deviated from that position. Consequently, I feel the district court also erred in finding a breach of the duty to fairly represent flowing from the delay in processing Walker's grievances.

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connection with the terminal-to-terminal implementation or his grievance or his representation at the Bi-State Committee hearing.

96. The Plaintiffs know of no misconduct by Local 71 except not requiring the ratification vote.

97. Up to the time of the Bi[-)State Decision on 9/16/86, Walker never complained or objected to Bowman about his representation or presentation to the Bi-State Committee.

101. Local 71 President, Conrad Sides, was upset at the Bi-State Committee decision which made the mileage effective May 4, 1986. He said that the Committee was "out of their mind." Sides, like Bowman, always believed that the gate-to-gate should be effective December 1, 1985 in accordance with the Contract.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED June 20, 1991

No. 89-1041

WALKER; BRADLEY COLESWORTHY; TERA B. SLAUGHTER; THOMAS DILLON

Plaintiffs - Appellees

v.

CONSOLIDATED FREIGHTWAYS, INC.; TRANSCON, INC.; PIE NATIONWIDE

Defendants - Appellants

and

TEAMSTERS NO. 71; TEAMSTERS LOCAL NO. 28; TEAMSTERS LOCAL NO. 61; TEAMSTERS NO. 391; TEAMSTERS LOCAL NO. 509; TEAMSTERS JOINT COUNCIL NO. 9; TRUCKING MANAGEMENT, INC.; CAROLINA TRUCKING ASSOCIATION, INC.

Defendants

No. 89-1044

HERMAN WALKER; BRADLEY COLESWORTHY; TERA B. SLAUGHTER; THOMAS DILLON

Plaintiffs - Appellees

v.

TEAMSTERS LOCAL NO. 71

Defendant - Appellant

and

CONSOLIDATED FREIGHTWAYS, INC.; TRANSCON, INC.; PIE NATIONWIDE; TEAMSTERS LOCAL NO. 28; TEAMSTERS LOCAL NO. 61; TEAMSTERS LOCAL NO. 391; TEAMSTERS LOCAL NO. 509; TEAMSTERS JOINT COUNCIL NO. 9; TRUCKING MANAGEMENT, INC.; CAROLINA TRUCKING ASSOCIATION, INC.

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Sprouse voted to rehear the case. Judges Wilkins and Hall voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Ervin, Phillips, Murnaghan, and Sprouse voted to rehear the case in banc; and Judges

Russell, Widener, Chapman, Wilkinson, Wilkins, Niameyer, and Judge Hall voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall.

For the Court,
JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED June 27, 1991

No. 89-1041

Walker v. Consolidated Freight

No. 89-1044

Walker v. Teamsters Local 71

MANDATE

The judgment of this court dated 4/11/91 takes effect today.

JOHN M. GREACEN
CLERK

Nos. 91-464 and 91-491

FILED
NOV 18 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

CONSOLIDATED FREIGHTWAYS, INC.
and TEAMSTERS LOCAL 71,
Petititoners,

v.

HERMAN WALKER, BRADLEY COLESWORTHY,
TERA B. SLAUGHTER, and THOMAS DILLON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

STATEMENT

These petitions seek review of a judgment granting redress to a class of inter-city truck drivers for their union's breach of its duty of fair representation and their employers' violation of the collective bargaining agreement under which they were employed. The drivers had been persuaded to ratify a proposed collective bargaining agreement ("CBA"), in part because the employers had included a significant provision increasing their wages by basing pay for inter-city trips on actual mileage driven from one trucking terminal to another, rather than on mileage between points in each city bearing no relationship to the terminals' location. Although that change was to be effective within six months of ratification, the union lost interest in implementing the

drivers' victory, and the change in mileage was not implemented until nearly a year later.

When the drivers learned that implementation had been delayed, and that the employers would not make the pay based on the new mileages retroactive to the contractually required date, they filed suit. The district court imposed liability against the union on several grounds and ruled that the employer had breached the CBA by not implementing the new payment rules on schedule. The court of appeals affirmed, and rehearing and rehearing *en banc* were denied. Separate petitions have been filed by the employer and the union, but both should be denied, principally because the questions set forth in the petitions either are not properly presented by this case, would not alter the outcome even if they were resolved in petitioners' favor, and/or do not present questions on which the lower courts are divided.

A. Facts.

The members of petitioner in No. 91-464, Local 71 of the International Brotherhood of Teamsters ("IBT"), work under a CBA with several employers, including the petitioner in No. 91-491, Consolidated Freightways, Inc. ("CF"). The CBA consists of the National Master Freight Agreement ("NMFA") and the Carolina Freight Council Over-the-Road Supplemental Agreement ("Carolina Supplement"). Each of the respondents is a member of Local 71 who works for CF as a truck driver.

Most of the drivers' wages are determined, not by the number of hours they work, but by the number of miles they drive, multiplied by a mileage rate. The number of miles driven is not determined by comparing the truck's odometer reading before and after each trip; rather, a standardized chart is used that assigns a certain number of miles to each inter-city route covered by the company's drivers.

In May 1985, the CBA was renegotiated and submitted to the affected membership for ratification. The new Carolina Supplement included a new Section 3 in Article 52, which is at the center of this case. It required that, within six months of the CBA's effective date, the employers would pay drivers for the actual mileage they drove, from the gate of the terminal of origin, to the gate of the terminal of destination (thus the short-hand expres-

sion "gate-to-gate" mileage). In previous contracts, road drivers has been paid based on an *estimated* mileage between cities, known as "post-office-to-post-office" or "AAA mileage," because the "zero point" for many cities is located near the post office, and American Automobile Association figures were often used for guidance. In almost all cases, gate-to-gate mileage benefits the drivers by increasing the number of miles paid for each trip.

The drivers in Local 71 voted for the conversion to gate-to-gate mileage. Indeed, this provision was a popular and significant proposal that played an important role in securing membership ratification of the new CBA. In negotiating the provision, the union intended that gate-to-gate mileage would be effective, and drivers would be paid on the basis of it, by December 1, 1985.

However, despite this intended effective date, petitioners did not even meet to begin discussing the conversion process until September 9, 1985, almost four months after the May 1985 ratification. On that date, the Carolina Negotiating Committee appointed a subcommittee to calibrate the mileages, acknowledging the December 1 deadline for implementation and instructing the subcommittee to submit its mileage checks by November 20. Nothing further was done until October 21, 1985, when the first mileage measurements began.

Not surprisingly, given the late start, none of the gate-to-gate mileage adjustments were implemented on December 1, 1985. Respondent Walker began asking union officials when they would become effective, and whether adjustments would be made retroactive to December 1. When he failed to receive satisfactory answers, he sought to exhaust his contractual remedies by filing "class-action grievances," on behalf of all road drivers covered by the Carolina Supplement, on February 17 and 25, 1986.

While these grievances were pending, the Carolina Bi-State Grievance Committee met on March 20, 1986, and accepted the report of the mileage subcommittee of the Negotiating Committee concerning gate-to-gate mileage. Ken Bowman, a Local 71 officer who was Walker's representative in connection with his grievances, was a member of that grievance committee and joined in the conclusion that "the mileages are accepted as submitted and shall be effective May 4, 1986," which was more than five months later than the contractual deadline, and six weeks after the

report was accepted.

In May 1986, after respondent Walker learned of the March 20 decision to delay gate-to-gate mileage, he filed a third grievance, requesting retroactive implementation of the mileage adjustment to December 1, 1985. This grievance was not heard until September 16, 1986, at which time it was consolidated with the February grievances, and all three were denied.

There is an important difference between Teamster grievance committees, such as the one that denied Walker's grievances, and the arbitrators for which most non-Teamster CBA's provide. If a grievance cannot be resolved by the union and employer representatives on the Bi-State Committee, two options are available. First, certain grievances may be referred by a majority vote of the committee (that is, union and employer representatives must agree) to an arbitrator, who is forbidden by the terms of the CBA from modifying the CBA. Second, failing such a majority vote, the parties are free to use self-help -- a strike or a lockout -- to force the other side to agree. The Bi-State Committee, unlike the arbitrator to whom the Committee may refer grievances, is not limited by the CBA to interpreting or applying the CBA; it may even decide to change the CBA if that is the best way to reach agreement and avoid a strike.

Although the CBA itself permits the Bi-State Committee to agree to amend the CBA, there is another agreement that imposes a significant limitation on the discretion of that Committee. The IBT Constitution provides that a CBA must be approved by the affected members before it can be effective, and that right includes not only the adoption of a CBA, but applies to amendments as well. Article XII, Section 1(b) (local contracts); Article XVI, Section 4(a) (regional and national contracts). In the past, Local 71 had invoked these constitutional provisions to require ratification votes on matters as obscure as a change in the lunch hour for loading dock workers. However, the union never called for a vote by the drivers on the five-month delay in converting to gate-to-gate mileage.

B. Proceedings Below.

This case was filed as a class action in the United States District Court for the Western District of North Carolina on

October 14, 1986. After a three-day trial on the issue of liability in May, 1988, the trial court granted judgment in favor of respondents on May 8, 1989, issuing findings and conclusions that are reported at 714 F. Supp. 178.

The district court found that the union had violated both its duty of fair representation ("DFR") and respondents' equal right to vote on contract changes under Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). The DFR was breached in several ways: by failing to seek timely implementation of the mileage changes, by repeatedly delaying the submission of respondent Walker's grievance pertaining to the timing of the changes, by failing to raise the issue of timing during the meetings of the Negotiating and Grievance Committees, by negotiating away the six-month deadline for mileage changes without receiving anything for the members in return, and, in light of the finding that the contract had been amended and not just interpreted, by consenting to the amendment without submitting it to the membership for ratification, as required by the IBT Constitution. The equal right to vote under section 101(a)(1) of the LMRDA, 29 U.S.C. §411(a)(1), was violated because other Teamster members had been accorded the right to vote on midterm modifications under this and other CBAs, but the union had refused to allow this issue to be voted on by respondents and other members of Local 71.

Turning to the contract question, the court noted that the contract expressly required the union and the employers to implement mileage changes by December 1, 1985. In defiance of this clear contractual language, which the bargaining history revealed was plainly intended to be applied to all gate-to-gate mileage recalibrations, the court found that petitioners had invented a spurious distinction to cover up their own delays in making the conversion to gate-to-gate mileage. Despite its numerous findings that the DFR had been violated, the district court acknowledged the strict standard for judicial review of arbitration decisions set forth in *Paperworkers v. Misco*, 484 U.S. 29 (1987), CF Pet. App. 29a, 30a, and applied that standard in deciding whether or not the employer had violated the CBA. In sum, it ruled that the CBA's language and negotiating history were so clear that the change in the effective date was a modification of the CBA, to which *Misco* does not apply, rather than an

interpretation of it.

The court of appeals affirmed the judgment of liability of the district court, although it narrowed the class entitled to benefit from it, a ruling that is not presented to this Court. Like the district court, it acknowledged that *Misco* forbids courts from disturbing arbitral decisions that draw their essence from the CBA, even if the court concludes that the arbitrator "has seriously misconstrued" the CBA. CF Pet. App. 57a-58a. However, the court found that the decision here went beyond interpretation to modification of clear contractual language because Section 3 "unequivocally states" that mileages were to be implemented within six months of the CBA's effective date, the lead time being provided to allow time to recalculate the mileages. Indeed, the mileage report did not make any request for interpretation of the agreement; rather, the grievance committee adopted the May 4 effective date out of the blue. This decision, the court concluded, did not draw its essence from the agreement, and so could not stand. CF Pet. App. 58a.

Local 71, the court agreed, had violated its DFR in a number of ways. First, Local 71 representative Bowman -- the very individual who was supposed to be representing respondents on their class action grievance seeking a December 1 effective date -- had joined in the March 20, 1986 committee decision, without even attempting to make an argument that the pay for gate-to-gate mileage should be retroactive to December 1, 1985. CF Pet. App. 58a-59a. Second, the local had failed to make diligent efforts to seek timely implementation of the mileage conversion provisions; had not submitted the changed effective date to the membership for approval; and had, indeed, delayed its prosecution of respondents' grievances, while simultaneously acquiescing in the new implementation date. "Each of these grounds supports a claim of breach of duty to fairly represent. . . . We find the evidence sufficient to support the district court's conclusions; therefore, we cannot overturn on appeal." CF Pet. App. 59a-60a. In light of these findings of violation of the DFR, the court did not reach the alternative ground given by the district court for holding against the union, the violation of the LMRDA's equal right to

vote.[1]

REASONS FOR DENYING THE WRIT

1. In No. 91-491, CF has sought this Court's review only of the question whether the court below applied the proper standard for reviewing arbitration decisions. In the course of arguing for review, CF suggests that, if the lower courts properly applied the *Misco* test, this Court should change the standard to make it even more deferential than the existing rule, first enunciated in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), that an arbitration award should be overturned if it does not "draw its essence from the CBA."

However, in a hybrid case such as this one, the case of the employees against each defendant consists of proving both that the DFR has been breached and, once that is shown, that the CBA was violated. The elements of the claim remain the same whether suit is brought against the employer alone, or against both the employer and the union. *DelCostello v. Teamsters*, 462 U.S. 151, 164-165 (1983). Ordinarily, an arbitration decision is final and binding against all parties, and can only be overturned under the

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[1] Petitioners had argued that the seven-month delay in processing respondents' grievances was caused in part by the illness of business agent Bowman in March and April 1986. But this illness did not prevent Bowman from sitting on the Bi-State panel that adopted the mileage subcommittee's report on March 20, 1986. Although he was supposed to be Walker's representative on the effective-date grievance, Bowman never mentioned that pending grievance, or the December 1 effective date, while the mileage committee report was being considered. Moreover, the mileage subcommittee had been established by the Negotiating Committee in response to a grievance filed by Charles Williams, a member of Local 391, which did not raise the issue of the effective date, presumably because December 1 was still a realistic possibility. Williams filed his grievance on September 4, 1985, and it was considered by the Negotiating Committee only five days later, on September 9, 1985. In other words, the union was capable of obtaining a quick meeting and decision when it wanted one, but made no efforts to get one on respondents' grievance. Moreover, the adoption of the new effective date was made in connection with a grievance that did not address the issue, and that decision was then cited back as a reason for denying respondents' argument about effective dates, on the ground that the decision had already been made. These manipulations formed part of the basis for the DFR findings, affirmed below, that are not challenged in the petitions.

standards set forth in *Enterprise Wheel*, and reaffirmed in *Misco*. Once a DFR breach is established, however, the employee need not overcome the *Misco* standard in order to prevail on the CBA question; rather, at that point the arbitration decision is no longer final and binding, *Hines v. Anchor Motor Freight*, 424 U.S. 554, 572 (1976), and the court then considers whether the employer's action was "erroneous" under the CBA. *Id.* at 572. The alleged violation of the CBA is then considered *de novo*, as an arbitrator would have done had the union not breached its DFR in the course of the grievance procedure.

a. Here, CF has not sought the Court's review of the conclusion below that the union breached its DFR in handling respondents' grievance concerning the implementation date for the mileage conversions; the findings below of DFR breach have all become final, at least as against CF. Thus, even if CF were correct that the standard applied here to the review of arbitration decisions that are final and binding was too permissive, because the *Misco* standard needs to be tightened as the employer suggests, the fact remains that, in light of CF's failure to contest the DFR findings, the joint committee decisions here are *not* final and binding, and CF was entitled to no more than a *de novo* review of the question of CBA interpretation; the review below under *Misco* standards, even if not sufficiently exacting, was more than CF was entitled to have. In those circumstances, the question of what standard should apply to judicial review of Teamster grievance determinations, including CF's argument for a revised standard of review, is not presented in No. 91-491, and CF's petition for a writ of certiorari should be denied for that reason alone.

b. The union, in ~~No. 91-464~~, has attacked both some of the DFR findings and the standard of review applied by the court below, but it has failed to draw into question all aspects of the DFR findings below. The court of appeals expressly upheld the determination of the district court that the union breached its DFR by "(1) failing to seek timely implementation of the provisions of the 1985 contract in a diligent fashion . . . and (3) delaying Walker's grievance while simultaneously acquiescing in the new implementation date." Union Pet. App. 59a. However, petitioner Local 71 only attacks the two other DFR violations upheld by the court of appeals -- the conduct of union representative Ken Bowman on

the March 20 committee, and the failure to submit the contract modification to the membership for ratification. *Id.* 59a. By limiting its challenge to those two holdings, petitioner Local 71 has allowed the other two DFR findings to become final against it, just as CF has allowed all the DFR findings to become final against itself. And, because of the findings of breach of the DFR, the courts were required to determine the contract question *de novo*, and neither petitioner was entitled to rely on the ruling of the joint grievance committee, let alone to give it any special deference.

Accordingly, like the similar question on which CF has sought review, this question set forth by Local 71 is simply not presented here. Even a reversal by this Court on the two DFR questions raised in the union's petition would not affect the outcome of the case, because Local 71 will remain liable for its breach of DFR on the two grounds not attacked in the petition. Under these circumstances, there is no reason for this Court to grant review since the outcome below cannot be changed based on the limited issues raised in the petitions.[2]

c. There is another defect of jurisdictional proportions in petitioners' effort to secure review of the aspects of the decision below that treated the change in the effective date as a contract modification rather than as an interpretation. Both petitions assume that the decision on the contract was made by a joint "grievance" committee, which, in turn, they treat as being tantamount to an arbitrator. In fact, the decision to change the effective date was not made by the parties' "grievance" committee, but rather by their "negotiating" committee.[3]

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[2] Even if all the DFR claims were resolved favorably to Local 71, it would still have to obtain reversal of the district court's LMRDA ruling, which the court of appeals did not specifically address. Since that ruling is so plainly correct, this presents another reason for this Court to deny review.

[3] Thus, it was the Negotiating Committee that made the basic decision that not all conversions would be completed by December 1, 1985, although technically it made that decision in the context of a "grievance." The Negotiating Committee then created a subcommittee that worked out all the mileage disputes; it was that Negotiating subcommittee that made all the substantive decisions. By the time the

(continued . . .)

There is no authority whatsoever that union and employer negotiators are entitled to any deference whatsoever in their construction of the CBA or in their resolutions of disputes about the workplace. Where, as here, the parties substituted the Negotiating Committee, which is not empowered to decide grievances, but only to propose contracts for possible ratification, for the Grieveance Committee, which is generally charged with applying the CBA, the courts should not accord the substitute the kind of deference that the proper committee might be given. Because the questions presented both depend on the assumption that the decisions in question were made by a "grievance committee" that is tantamount to an arbitrator, there would be no basis to decide those questions given the fact that it was a negotiating committee, not a grievance committee, let alone an arbitrator, that was responsible for the decisions here.

2. In addition to the reasons given above, there are other grounds to deny the standard of review questions presented in both petitions. The employer petitioner, No. 91-491, in effect concedes that the standards of existing law were met, but asks the Court to review this case in order to modify those standards to make it virtually impossible to overturn an "arbitration" decision. The union petitioner, by contrast, argues in No. 91-464 that the court below failed to apply the existing standard of review insofar as it considered respondents' contentions about the CBA before it considered the analysis of the CBA purportedly set forth by the "arbitral" body.

Taking the employer objection first, the contention that there is a massive problem in the courts of appeals with respect to

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(. . . continued)

March 20 grievance committee meeting was held, according to the employer chairman of the negotiating committee, there was "no controversy before the March 20 committee because the [negotiating] committee had ironed it out, and we were making it a part of the official record." Ct. App. JA 472. The fact that this negotiated compromise was ratified by the grievance committee does not change the fundamental facts that the decisions were made by the union and employer representatives on the negotiating committee, and that the union and employers freely substituted one committee for another, in making their mutual decision to delay implementation of the mileage conversion beyond the date that had been approved by the membership in voting to ratify the CBA.

the application of the standard of *Misco* and *Enterprise Wheel* is unpersuasive. Petitioner bases its request on the opinions of dissenting appellate judges in two fact-bound cases, *IBEW Local 429 v. Toshiba America*, 879 F.2d 208 (6th Cir. 1989), and *Delta Queen Steamboat Co v. MEBA District 2*, 889 F.2d 599 (1989), *reh. den.*, 897 F.2d 746 (5th Cir. 1990), each of which contends that the majority opinion there is, on the facts of that case, insufficiently deferential in considering the arbitral outcome. Petitioner then seeks to generalize from these dissents to the proposition that the courts of appeals have not accepted the lessons of *Misco*. In fact, there is no common theme between *Toshiba* and *Delta Queen*, or, indeed, between those cases and this one, except for the fact that, in each case, there is a dissenter who thinks that the majority incorrectly applied existing law. Three cases do not make any epidemic of disregard for *Misco*. There is no genuine disagreement among the circuits about the manner in which *Enterprise Wheel* and *Misco* should be applied, and no need for this Court to address the proper standard again, in this case or otherwise.

Apart from the lack of genuine conflict among the lower courts, the proposition that petitioner CF would have the Court adopt goes too far in the direction of insulating arbitral misconduct from review. According to CF, an arbitration award should be upheld if there is any conceivable basis on which an arbitrator could have reached the particular result, even if it is apparent from review of the arbitral determination that the arbitrator "applied his own brand of industrial justice" rather than basing his decision on the CBA. In those circumstances, however, the parties have not obtained what they bargained for: an arbitral construction of their contract. The fact that an arbitrator (in this case, actually, a Teamster joint committee) might have reached the same result had he applied the contract rather than some other basis for decision does not change the fact that *this* arbitrator did not do so, and the party that lost before the arbitrator should not be saddled with the decision simply because a fair arbitrator might have reached the same result. Here, the court below concluded, after a careful review of the record, that what the joint committee did was modify the existing agreement, based on their notions of what ought to be agreed to, rather than simply applying the existing agreement, and such a modification, without a new ratification vote, was not what the respondents here

bargained for.

Nor is there any general disagreement among the courts of appeals about the issue presented by petitioner union in No. 91-464: whether it is appropriate to consider the arbitrator's rationale before addressing the contentions of the plaintiff who is attacking the arbitral outcome. More fundamentally, petitioner's contention about the proper order of consideration is trivial. Obviously, when a plaintiff brings a case attacking an arbitral outcome, both the plaintiff's contentions and the arbitral outcome will have to be analyzed, and it makes no difference which is analyzed first. Here, acknowledging the highly deferential standard of review that obtains under *Misco*, the court below decided that respondents' argument for a December 1, 1985, effective date was not just a better view of the contract, but was the only rational view of the contract, and there was simply no basis in the language or negotiating history of the CBA for the proposition that the conversion was to be effective on May 4, 1986. It is that underlying conclusion, and not the order of consideration, that is significant.

Indeed, in the circumstances of this case, it would have been difficult to consider the rationale of the "arbitration" committee before considering the analysis advanced by respondents, for the simple reason that the committee gave no explanation for its decision: it simply announced its outcome. The elaborate rationales advanced in the petitions are no more than post-hoc explanations invented by counsel solely for the purpose of litigation, and the courts below were certainly not obligated to treat those rationales with the deference that would have been due to the explanations of an arbitrator.

The employer's contention about the CBA, stripped to its essentials, is that there was a conflict between Section 2 and Section 3 in Article 52. The argument continues that the union, believing that the real advantage to be gained by its members lay in securing a review of the "trunk" mileage whose recalibrations were arguably governed by Section 2, traded away the prompt conversions demanded by Section 3 and required only "spur" calculations in return for relatively quick, but non-retroactive, recalculations of all mileage combinations involving both spurs and trunks. We agree with the determinations of the courts below that this argument was a post-hoc invention of counsel that does not draw its essence from the CBA. However, it is important to

note that even this argument assumes that the union agreed to modify the six-month requirement of Section 3 in order to obtain a valuable benefit for the membership. The flaw in the argument, of course, is that membership ratification would have been required under the IBT Constitution even for this mid-term modification, whether it was beneficial or not. In the Teamster union, it is the affected membership, not the leadership, that decides whether the proffered benefit was worth the change in the CBA. Accordingly, even on petitioners' strongest argument, there was an admitted modification of the CBA, and the decisions below would have to be affirmed.

3. In No. 91-464, the union petitioner also seeks the Court's review of the determinations below that the union breached its DFR by virtue of the conduct of one of its representatives on the March 20 committee (Question 1), and by failing to submit the contract change to the membership for ratification (Question 2).

a. On Question 1, petitioner first argues that the decision below violates arbitral immunity in some respect. Of course it does not; it is only the union that has been held liable, not the "arbitrator," in this case for the conduct of one of its agents, just as, for example, a municipality may be held liable under 42 U.S.C. § 1983 for the misconduct of one of its agents, even if the agent is immune from personal liability. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

On the question of union liability, petitioner cites a number of cases that have held that union representatives on joint grievance committees do not have a DFR. The court below did rely on the proposition that union representatives on joint committees do have some DFR obligations to support one of the four bases for finding a breach of the DFR, and we do not deny that this is an important question that the Court may ultimately wish to resolve. There are, however, two ways in which the decision below is factually idiosyncratic, and thus not a proper vehicle for addressing that question.

First, there is no conflict among the lower courts about the proposition that members of Teamster/employer committees that *modify* a CBA do have a DFR. The decision below is in accord with the only other reported decision of which we are aware on this point: *Warner v. McLean Trucking Co.*, 574 F. Supp. 291, 299-300 (S.D. Ohio. 1983).

Second, this case is atypical in that Ken Bowman, the Local 71 representative on the March 20 committee, was the very same individual who was supposed to be pursuing respondents' grievance over the proper effective date for implementing the new gate-to-gate payment system. Whether or not union representatives on grievance committees should generally be subject to the DFR is an important question on which there may be legitimate grounds for differences of opinion. However, whether a representative who participates in committee consideration of the very issue on which he has accepted the role of an advocate is an easy question on which there can be no doubt: such a representative can not rid himself of his obligation to the grievant, which is simply to refrain from arbitrary refusals to advocate that position, as Bowman did here.

b. As to the union's Question 2, there is no significant division of authority concerning its obligation to permit members to ratify a contract modification *where the union's governing documents so require*. The IBT Constitution contains such a requirement, and every court to consider the matter has found a breach of either the equal right to vote, or the DFR, or both, when the union fails to submit a mid-term contract modification or reopener for ratification, especially where other contract changes, of far less significance, are routinely put to a vote. *See Sako v. Teamsters Local 705*, 125 LRRM 2372 (N.D. Ill. 1987); *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984), *app. dism.*, 119 LRRM 2247 (D.C.Cir. 1985); *Parker v. Teamsters Local 413*, 501 F. Supp. 440 (S.D. Ohio 1980), *aff'd mem.*, 657 F.2d 269 (6th Cir. 1981); *Conroy v. Teamsters Local 705*, 124 LRRM 3240 (N.D. Ill. 1985). There is no reason to grant review of this question, either in this case or in the future.[4]

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[4] The text of the union's petition, which exceeds the 30 pages permitted by Rule 33, attempts to introduce numerous issues that are not included in the Questions Presented. Because the Court would not have jurisdiction to consider those issues, we do not address them.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Nos. 91-464 and 91-491

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEAMSTERS LOCAL NO. 71,
and CONSOLIDATED FREIGHTWAYS, INC.,

Petitioners,

v.

HERMAN WALKER, BRADLEY COLESWORTHY,
TERA B. SLAUGHTER and THOMAS DILLON,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM

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REPLY MEMORANDUM

Plaintiffs concede that the legal issues raised by the Union merit consideration by the Court. [Memorandum at 13-14]. Their attempts to evade their concession lack merit.

1. Plaintiffs concede that the question posed by the Union is worthy of the Court's consideration, but erroneously contend that the instant case is "factually idiosyncratic" and not a proper vehicle for raising the issue. [Memorandum at 13-14]. While the courts agree that a bi-partite committee cannot amend the contract, the Union has never argued to the contrary. Rather, this case is a perfect vehicle for determining whether a union is the guarantor of

the actions of its agent acting in a quasi-judicial capacity wholly distinguishable from the union's normal representational functions.

The record fails to support Plaintiffs' second attempt to distinguish this case. There is no evidence that Bowman did anything improper while serving on the March 20 Bi-State Committee panel. The record contains the panel's majority decision. But because arbitrators cannot be compelled to reveal their deliberations,[1] there is no evidence that Bowman was part of the majority or that he failed to raise the issue of retroactivity. It is undisputed that Bowman and Local 71 subsequently attacked the March 20 decision. [Petition at 10-11]. Bowman's mere physical presence on March 20 is insufficient to make this case idiosyncratic.

2. Plaintiffs erroneously seek to limit the scope of the Union's Petition. [Memorandum at 8-9]. While not directly challenging the findings that it failed to timely implement the mileage recalibration and delayed processing Walker's grievance, the Union did assert that these findings were contrary to the stipulations executed by the parties. [Petition at 15-16]. More importantly, Plaintiffs have not proven, and neither court found, that those two violations

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[1] *See, e.g., Local P-9, UFCW v. George A. Hormel & Co.*, 776 F.2d 1393, 1395 (8th Cir. 1985) (and cases cited); *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978); *DeFrayne v. Miller Brewing Co.*, 444 F.Supp. 130, 131 (E.D. Mich. 1978); *Brownko International, Inc. v. Ogden Steel Co.*, 585 F.Supp. 1432, 1435-1436 (S.D.N.Y. 1983); *Wood v. Teamsters Local 406*, 583 F.Supp. 1471, 1472-1473 (W.D. Mich. 1984).

caused the allegedly erroneous decision of the Bi-State Committee. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976).[2] Absent a finding on causation, the violations standing alone warrant only nominal damages. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266-267 (1977).

Thus, if the Court vacates its decision, on remand the Fourth Circuit would have to consider the remaining allegations anew and would have to reconsider the Union's statute of limitations argument.[3]

3. Local 71 does not dispute Plaintiffs' contention that mid-term modifications of contracts must be ratified. Plaintiffs do not, apparently, dispute Local 71's assertion that ratification is unnecessary where the union

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[2]The Court held that "if [a union's breach of the duty of fair representation] seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract." Here there was no allegation that mere delay tainted or "seriously undermined" either the March 20 or September 16 decisions.

[3]The Union argued that the statute of limitations barred consideration of the Complaint. The District Court found that Plaintiffs acted within six months of learning of the March 20 Bi-State Committee decision. [Petition App. 23a-24a]. The Fourth Circuit did not consider the Union's statute of limitations argument. But if this Court overturns the violations based upon the March 20 decision, the Fourth Circuit would be compelled to consider whether the Complaint was timely based only upon the delay in recalibrating the mileage and the delay in the hearing.

denies that it has negotiated an amendment and where the courts have found that the apparent negotiating forum lacked authority to amend the contract. If the courts are correct, the amendment should be voided and the absence of ratification would be irrelevant. That is the issue we urge the Court to consider.

4. Plaintiffs' reliance upon *Owen v. City of Independence*, 445 U.S. 622 (1980), demonstrates the far-reaching impact of their attack on arbitral immunity. By asserting that only the arbitrator, and not his employer, is immune, Plaintiffs would hold states and the federal government liable even where judges are immune from personal liability for their judicial acts. *Cf. Stump v. Sparkman*, 435 U.S. 349 (1978). Plaintiffs would require a rule that a law firm in which an arbitrator was employed was financially liable if the arbitrator abused his authority.

More importantly, Plaintiffs would ignore the rule that union officials sitting on a grievance committee act as neutrals rather than as representatives of the union. *See* Petition at 20-21 and cases cited therein. Plaintiffs, not the Union, seek the major change in the law represented by the Fourth Circuit's decision.

5. Plaintiffs misconstrue the Employer's and the Union's reliance upon *Paperworkers v, Misco, Inc.*, 484 U.S. 296 (1987). The present case involves two arbitration decisions subject to review under the *Misco* standard. Plaintiffs never alleged that Local 71 violated its duty of fair representation in its presentation of Walker's grievances on September 16, 1986. Therefore, the September 16 award is not tainted and must be reviewed under *Misco*. There is no *de novo* review.

The September 16 award relies on a March 16 Bi-State Committee award involving Local 391's grievance and the receipt of the mileage recalibration. Assuming, *arguendo*, that Local 71 Business Agent Ken Bowman had a duty of fair representation while sitting on the March 20 Bi-State panel, he did not owe it to Local 391 or any employee represented by Local 391. Thus, the March 20 decision was not tainted by a breach of duty owed to a party in that case. *Misco* also applies and there is no *de novo* review.

In any event, Bowman argued on September 16 that the March 20 decision was wrong.

6. Plaintiffs seriously distort the record. Thay assert that "the union lost interest in implementing drivers' victory". [Memorandum at 1-2]. To the contrary, the Unions successfully fought to expand the contractual change to include trunk mileage, which provided the eventual gain for the drivers. This effort to include recalibration of the trunk mileage, not any loss of interest, delayed the recalibration process.

Plaintiffs erroneously argue that the Carolina Negotiating Committee first extended the effective date of the recalibrations beyond December 1. [Memorandum at 9-10 and n. 3]. To the contrary, the District Court and the Fourth Circuit both found that the Carolina Negotiating Committee expressly required implementation effective December 1. [Petition App. 12a-13a, 52a-53a]. Indeed, Plaintiffs stipulated that Walker and Local 71 both argued to the Bi-State Committee on September 16 that the Carolina Negotiating Committee's directive of a December 1 effective date was controlling. [Petition at 11].

Most importantly, and most egregiously, Plaintiffs assert that "the Bi-State Committee, unlike the arbitrator to whom the Committee may refer grievances, is not limited by the [collective bargaining agreement to interpreting or applying the [collective bargaining agreement]; it may even decide to change the [collective bargaining agreement] if that is the best way to reach agreement and avoid a strike." [Memorandum at 4]. If that were true, Plaintiffs would necessarily have lost before the District Court and the Fourth Circuit, both of which concluded that the Bi-State Committee amended the contract in direct violation of its contractual authority.

Plaintiffs' misunderstanding of the authority of the Bi-State Committee fatally undermines their argument concerning the obligation of the Union members of the Committee.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition for a Writ of Certiorari should be granted.

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